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No. 983

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ALASKA FISH AND LUMBER COMPANY,

Plaintiff in Error,

vs.

EDWARD A. CHASE,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

Reports of Circuit

Court of appeals

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In the United States District Court in and for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,

Plaintiff,

vs.

ALASKA FISH AND LUMBER COMPANY,

Defendant.

Complaint.

Now comes the above-named plaintiff, and for cause of action against the above-named defendant alleges:

1.

That defendant is a corporation duly incorporated under the laws of the territory of Arizona, but doing business and having property within the District of Alaska, Division No. 1.

2.

That plaintiff is now and has been for many years a fisherman, engaged in the business of superintending the taking, canning, and otherwise preparing for the market, salmon and other fish in large quantities; and such business is his calling and vocation in life.

3.

That heretofore, to wit: On the 14th day of February, 1902, the plaintiff and defendant made and en-

tered into a contract and agreement wherein and whereby the defendant employed the plaintiff for the period of one year, beginning March 1st, 1902, as superintendent, or foreman, for defendant in its fishing and canning business, at an agreed and stipulated consideration to be paid by defendant, of $200.00 per month, board and lodging for the said year, and expenses in traveling to and from Seattle, Washington, to Alaska. A copy of said contract is hereto attached, marked Exhibit "A" and made a part hereof.

4.

That immediately after the execution of said contract, the plaintiff pursuant to said contract, and the directions of the defendant, came to Shakan, Alaska, and took charge as superintendent of the defendant's salmon canning establishment at that place. That thereafter, plaintiff faithfully performed all the duties required of him, as such superintendent, and fully performed his part of said contract until the 24th day of June, 1902; and was then and has ever since been ready, willing and able to perform his said duties as such superintendent under and pursuant to said contract.

5.

That on the said 24th day of June, 1902, defendant without cause and in violation of said contract, discharged plaintiff from his employment, and refused to permit him to perform further said contract.

6.

That the said business mentioned above is of such

a nature that is is customary and necessary to secure employment therein by the year or for the whole season of fishing and canning, and plaintiff, although he has endeavored so to do, has not been able, and will not be able, prior to the beginning of the next season of fishing, to wit, about March 1st, 1903, to secure any employment and will during the whole period from June 24th, 1902, to March 1st, 1903, be left without employment and compelled to support himself at his own expense.

7.

That defendant has only paid plaintiff the sum of $766.66 on his wages due and to become due under said contract, and refuses to pay plaintiff's expenses to Seattle, or to pay his board and lodging, from and after said 24th day of June 1902; that by reason of the breach of contract by defendant as aforesaid, plaintiff has been damaged in the following sums, to wit:

For loss of wages.....	$1633.33
Expenses for board and lodging.....	410.00
Expenses return trip to Seattle.....	25.00
Making an aggregate of	$2068.33

Wherefore, plaintiff prays judgment against defendant for the sum of two thousand sixty-eight and 33-100 ($2068.33) together with costs herein incurred.

MALONY & COBB,
Attorneys for Plaintiff.

United States of America,
District of Alaska } ss.

Edward A. Chase, being first duly sworn, deposes and says: I am the plaintiff in the above-mentioned action; I have heard read the foregoing complaint and know the contents thereof, and the matters and things therein set out are true, as I verily believe.

[Seal] EDWARD A. CHASE,

Subscribed and sworn to before me this 2d day of October, 1902.

[Seal] J. H. COBB.
Notary Public in and for Alaska.

[Endorsed]: No. 183. In the United States District Court in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish & Lumber Co., Defendant. Complaint. Filed Oct. 3, 1902. W. J. Hills, Clerk.

In the United States District Court in and for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Demurrer.

Comes now the above-named defendant and demurs to the complaint here on file in the above-entitled cause,

for the reason that the said complaint does not state facts sufficient to constitute a cause of action.

W. E. CREWS,
Attorney for Defendant.

[Endorsed]: No. 183-A. United States of America, District of Alaska, Division No. 1. In the United States District Court in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish & Lumber Company, Defendant. Demurrer. Filed November 4th, 1902. W. J. Hills, Clerk.

Copy received.

MALONY & COBB,
Attorneys for Plaintiff.

In the United States District Court for the District of Alaska, Division No. 1.

Tuesday, December 2d, 1902.

EDWARD A. CHASE, Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY, Defendant.
No. 183-A.

Order Overruling Demurrer.

And now, on this day, this cause came on to be heard on the demurrer of the defendant to the complaint of the plaintiff herein, and after argument had, the Court

being fully advised in the premises, overrules said demurrer, and the defendants are given 30 days in which to answer herein.

M. C. BROWN,
Judge.

In the United States District Court in and for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Answer.

Comes now the defendant and for answer to plaintiff's complaint, on file herein, admits, denies and alleges as follows:

I.

That for the latter clause of paragraph 1, of plaintiff's complaint, defendant has no knowledge or information sufficient to form a belief, and, therefore, denies the same.

2.

Answering paragraph 2, defendant alleges that it did enter into a contract in writing with plaintiff; and as to the terms and conditions of said contract, defendant herewith refers to said contract, which is in writing.

3.

As to paragraph 3 of plaintiff's complaint, defendant denies the allegations therein contained.

4.

Answering paragraph 4, defendant denies each and every allegation therein contained.

5.

As to paragraph 5, defendant allegss that it has no knowledge or information sufficient to form a belief and, therefore, denies the same.

Answering paragraph 6, defendant denies each and every allegation therein contained, except as hereafter alleged.

For further, separate and affirmative defense, defendant alleges that plaintiff failed and neglected to in anywise perform the conditions of the contract of employment on his part; and that the plaintiff is unskilled, negligent and incompetent, and in all respects *formed* to perform the duties for which he was employed; and the defendant was compelled to and did employ other persons to perform the duties for which the said plaintiff was employed; that plaintiff in no respect complied with the terms of his contract, and his representations as to his knowledge, skill and ability were false; that by reason of the unskilfulness, want of knowledge and lack of experience on the part of said plaintiff, defendant was compelled to dispense with his services by mutual agreement between the plaintiff and the defendant on or about the 24th day of June, 1902, at which

time plaintiff and defendant had a mutual, full, complete and absolute settlement of all differences between them. Defendant then and there paid to the plaintiff all sums of money due the plaintiff for his services theretofore rendered; which settlement was in all respects satisfactory to the plaintiff in all particulars; and plaintiff then and there made, executed and delivered his receipt in writing in full and of all demands, which receipt defendant now holds, and which settlement was a complete and absolute one, and satisfactory to all parties at the time.

Defendant denies that it, at this time, is indebted to the plaintiff in the sum of $2088.33, or any other sum whatsoever.

Wherefore, defendant prays that it go hence without day and have judgment for its costs and disbursements.

W. E. CREWS,
Attorney for Defendant.

United States of America,
District of Alaska. } ss.

I, W. E. Crews, being first duly sworn, on oath, say: That I am the attorney for the defendant in the above-entitled action; that I have read the foregoing answer and know the contents thereof, and believe the same to be true; that I make this affidavit because none of the officers or agents of the defendant are now within the District of Alaska; and all of the material allegations of said answer are within my knowledge.

W. E. CREWS.

[Endorsed]: 183-A. United States of America, District of Alaska, Division No. 1. In the United States District Court in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Answer. Filed January 7, 1903. W. J. Hills, Clerk.

In the United States District Court in and for the District of Alaska, Division No, 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER CO.,
Defendant.

Reply.

Now comes the plaintiff and for reply to the answer of the defendant, admits and denies as follows:

1.

He admits that the defendant paid the plaintiff for his services rendered prior to June 24th, 1902.

2.

He denies all and singular the other and remaining allegations of said complaint, and says that the same are untrue.

MALONY & COBB,
Attorneys for Plaintiff.

United States of America,
District of Alaska. } ss.

Edward A. Chase, being first duly sworn, deposes and says: I am the plaintiff in the above-mentioned action; I have heard read the foregoing reply and know the contents thereof and the matters and things therein set out are true as I verily believe.

EDWARD A. CHASE.

Subscribed and sworn to before me this 28th day of January, 1903.

[Seal] E. F. ROSE,
Notary Public in and for Alaska.

Service of the above and foregoing reply is admitted to have been duly made this 28th day of January, 1903.

W. E. CREWS,
Attorney for Defendant.

[Endorsed]: 183-A. United States of America, District of Alaska, Division No. 1. In the United States District Court in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Reply. Filed January 29th, 1903. W. J. Hills, Clerk.

In the United States District Court for the District of Alaska, Division No. 1.

Thursday, February 12, 1903.

EDWARD A. CHASE, Plaintiff,
vs.
ALASKA FISH AND LUMBER CO., Defendants. } No. 183-A.

Trial.

Now on this day this cause having come on regularly for trial, both plaintiff and defendant appearing by their respective counsel, plaintiff being represented by Messrs. Malony & Cobb, defendant being represented by W. E. Crews, Esq., and on announcing ready for trial the following proceedings are had: Roy Burnett, J. C. Burgess, Fred L. Weaver, J. A. Mason, Ben Bullard, S. J. Mathews, R. T. Harris and A. M. Ross, were selected as jurors to try the issues in this case and it appearing to the Court that the regular panel of petit jurors is exhausted, it is ordered that the clerk issue a special venire directing the United States marshal to summon from the body of the District and not from bystanders, six talesmen qualified as jurors to complete the panel herein. Thereafter the venire being returned, Wilbur Purdy, John Hill, and George Burford were selected

as jurors, and it appearing to the Court that the special venire is exhausted and but eleven jurors in the jury-box, and counsel for both parties hereto agreeing to go to trial with a jury composed of eleven men, the jury was sworn to try the issues thereof. Whereupon Edward A. Chase and H. E. Biggs were sworn to testify in behalf of the plaintiff and after the offering of exhibit by plaintiff, plaintiff rested his cause: thereupon counsel for defendant offered in evidence affidavit of Mr. J. D. Carroll and the defendant rested his cause; whereupon Edward A. Chase and W. E. Briggs were recalled and testified in behalf of the plaintiff in rebuttal, and plaintiff again rested his cause; thereupon defendant presented his motion for the Court to instruct the jury to return a verdict for defendant which, after argument had, the Court being fully advised in the premises, denies and to the ruling and order of the Court defendant, by counsel, excepts and after argument by counsel, the jury being duly instructed as to the law in the premises, retired in charge of a sworn bailiff for deliberation and thereafter returned into court and being called and each answering to his name, presented their verdict which is in the words and figures as follows:

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Verdict.

We, the jury selected, impaneled and sworn in the above-entitled and numbered cause, find for the plaintiff, and assess his damages at the sum of seventeen hundred and seventy-three dollars ($1773.00),

J. A. MASON,
Foreman.

To the above verdict counsel for defendant excepted. Thereupon the jury was discharged from further consideration of this cause.

[Endorsed]: No. 183. United States of America, District of Alaska, Division No. 1. In the United States District Court in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Verdict. Filed February 12th, 1903. W. J. Hills, Clerk.

In the United States District Court in and for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Motion for New Trial.

Comes now the above-named defendant and moves the Court to set aside the verdict heretofore on the —— day of February, 1903, rendered in the above-entitled cause, and grant the defendant a new trial for the following reasons:

1.

The complainant in the above-entitled cause does not state facts sufficient to constitute a cause of action; and the allegations therein does not support the verdict as rendered.

2.

Surprise which ordinary prudence could not have guarded against.

Newly discovered evidence material to defendant's defense, which it could not with reasonable diligence have discovered, and produced at the trial.

4.

Excessive damages appearing to have been given under the influence of passion or prejudice.

5.

Insufficiency of the evidence to justify the verdict, and that it is against the law.

6.

Errors of law occurring at the trial are excepted by the defendant. This motion is based upon the files and records in the case, and affidavits hereafter to be filed.

W. E. CREWS,
Attorney for Defendant.

[Endorsed]: 183-A. United States of America, District of Alaska, Division No. 1. In the United States District Court in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. the Alaska Fish & Lumber Company, Defendant. Motion for a new trial. Filed February 16th, 1903. W. J. Hills, Clerk.

Due service of a copy of the within motion is admitted this 16th day of February, 1903.

MALONY & COBB,
Attorneys for Plaintiff.

In the United States District Court in and for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.
No. 183-A.

MALONY & COBB, for Plaintiff.

W. E. CREWS, for Defendant.

Decision of the Court on Motion for a New Trial.

MELVILLE C. BROWN, Judge.—This action was tried before a jury on February 12th, 1903, and the jury returned a verdict for the plaintiff in the sum of $1773.00. Thereafter and within the time provided by law, on February 16th, 1903, the defendant filed its motion for a new trial in words and figures as follows, omitting the caption to wit:

"Comes now the above-named defendant and moves the Court to set aside the verdict heretofore, on the 12th day of February, 1903, rendered in the above-entitled cause and grant the defendant a new trial for the following reasons:

I.

The complaint in the above-entitled cause does not state facts sufficient to constitute a cause of action, and the allegations therein does not support the verdict as rendered.

2.

Surprise which ordinary prudence could not have guarded against.

3.

Newly discovered evidence material to defendant's defense, which it could not with reasonable diligence have discovered and produced on the trial.

4.

Excessive damages appearing to have been given under the influence of passion or prejudice.

5.

Insufficiency of the evidence to justify the verdict, and that is against law.

6.

Errors of law occurring at the trial and excepted to by the defendant.

This motion is based upon the files and records in this cause, and the affidavits hereafter to be filed.

W. E. CREWS,

Attorney for Defendant."

Time was requested and granted within which to file affidavits in support of the motion for new trial, and these having heretofore been filed, the case now comes on

for hearing at this present term of court on motion so supported.

It may be well first to address our attention for a few moments to the character of the motion itself. The pleader in this case, as in so many others in this court, has contented himself with reciting the statutory grounds for motion for a new trial, without setting out any specific cause or ground therefor whatsoever. I have frequently decided that a motion for a new trial in the language of the statute, making no specification of the actual and particular grounds relied upon, is of no avail, and does not direct the attention of the Court to any error; much less does it require the Court to pass upon claimed errors occurring at the trial.

Under the California Code, a statement is required to be filed in which shall be specified the particular errors upon which the moving party will rely. The motion for a new trial refers to this specification, and unless the specific error is clearly stated, the court of nisi prius may decline to consider them; and the Appellate Court will refuse to consider any error occurring on the trial not specifically presented in such statement.

Reynolds vs. Lawrence, 15 Cal. 361.
Walls vs. Preston, 25 Cal. 61.
Moore vs. Murdock, 26 Cal. 524.
Burnette vs. Pacheco, 27 Cal. 410.
Partridge vs. San Francisco, 27 Cal. 417.
Ziegler vs. Wells F. & Co., 28 Cal. 265.
Barsto vs. Newman, 34 Cal. 91.

Thompson vs. Patterson, 54 Cal. 546.

Crane vs. Glading, 59 Cal. 393.

25 Cal. 483.

These cases, and particularly 25 Calif. 483, not only tend to show that the specification must be made, but the particularity with which such specifications are required; and appeals were frequently dismissed under the California practice where such specifications had not been filed.

People vs. Goldberg, 10 Cal. 312.

People vs. Comedo, 11 Cal. 70.

Sayre vs. Smith, 11 Cal. 112.

The specifications of errors in a statement is in no sense an assignment of errors. An assignment of errors as understood in the common-law sense is never used under the code as a part or as pertaining to the statement required by the statute.

Hutton vs. Reed, 25 Cal. 483.

Under our statute in Alaska, the matter of exceptions is treated in sections 221, 222 and 223. Section 223 refers to the statement in the following language:

"The statement of the exceptions when settled and allowed shall be signed by the Judge and filed with the clerk and thereafter it shall be deemed and taken to be a part of the record of the cause. No exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal, or made wholly upon matters in writing and on file in the court."

No time is fixed by our statute within which the statement here referred to shall be filed, and under our prac-

tice, the statement is deemed equivalent to a bill of exceptions that may be filed at any time during the term; or, where the decision or trial is had on the last days of the term, within thirty days after the close of the term, and this time may be extended by order of the Court or Judge entered in term time. Whether our rules of practice are entirely in harmony with this statute may be questioned, but they seem sufficiently so to be enforced and adhered to in this behalf.

A motion for a new trial must be filed within three days after the rendition of the verdict or other decision sought to be set aside, but provision is made that affidavits may be filed in support of certain grounds of motion at a later date, and the time for filing these may be also extended.

It is clear that the statement relied on by the California courts which specify the particular errors complained of, can by no possibility be before the Court at the time the motion for a new trial is considered. Should it be required to be filed before the motion for a new trial is to be considered by the Court, and it were not so filed, then under the California decisions the motion for a new trial would be overruled as a matter of course and all rights of appeal as to errors occurring at the trial would be lost to the moving party. Our statutes seems to contemplate that this statement should not be filed, but that the motion for a new trial itself should present the errors complained of as clearly and as specifically as the statement required under the California Code. Section 229 of our statute determines the character of the motion for a new trial, and it is in the following language:

"In all cases of motion for a new trial, the grounds thereof shall be plainly specified, and no, cause of new trial not so stated shall be considered or regarded by the Court."

The language of this section as to the motion is fully as mandatory in its terms as the statute of California requiring the errors complained of to be specifically set forth in the statement. It therefore follows, that unless this specification of errors in motion for a new trial as clearly sets forth the errors relied upon as is required by the statement referred to in the California Code, then the court at nisi prius is not required to consider or regard the same in passing the motion for a new trial.

I now refer to the substance of the motion; and considering the first specification briefly, which is equivalent to a general demurrer to the complaint on the ground that the same does not state facts sufficient to constitute a cause of action. In support of this ground of the motion, counsel for the defendant argued with great vigor and earnestness that the complaint is a claim for labor and services, and not for damage for breach of contract, and cites James vs. Allen County, 44 Ohio St. 226, S. C. Am. Rep. 821. This case holds in effect that—

"Where a servant is wrongfully discharged, but his wages are paid up to that time, he cannot recover for future installments but only for breach of contract."

The case reviews at considerable length the holdings of different courts upon questions involved. In this case, under a contract for a specified term, the plaintiff entered upon a discharge of his duty and before the completion of the term was discharged by the defendant as it was

claimed without any just or reasonable cause. The defendant set up in their answer as a defense a former suit wherein the plaintiff had recovered of the defendant $205.30, and the complaint in the former case was in the exact terms of the complaint in the latter case excepting as to the amount. The Court, after discussing many of the authorities upon the various questions raised held, as stated in the syllabus, that the party could sue for the breach of the contract, but could have but one recovery and that would be a bar to a future suit. James recovered in the District Court. The case was appealed to the Supreme Court of the State, and the plea of former recovery was sustained and the judgment of the district court reversed.

The doctrine of constructive service for which suit could be brought lawfully, as it is claimed, at one time in England and in the some of the states of the United States, seems to have been overturned as the law of England and mainly so in the states of the Union. It is said in Munday vs. Leverich, 4 Daly, 401, that a servant wrongfully dismissed cannot wait until the expiration of the period and then sue for his whole wages on the ground of constructive service, his only remedy being an action on the contract for hire.

Howard vs. Daly, 61 N. Y. 62, S. C. 19 Am. Rep. 285.

It would seem that Alabama, Mississippi, Missouri and Wisconsin disapprove the doctrine of constructive service.

Without further consideration of this question, it is deemed sufficient to say that the great weight of authority

now is, that suit for constructive services under such conditions as are presented in the case at bar, cannot be maintained.

Chamberlain vs. Morgan, 68 Pa. St. 168.
Willoughby vs. Thomas, 24 Gratt. 522.
Chamberlain vs. McCallister, 6 Dana, 352.
Whitaker vs. Sandifer, 1 Duvall, 261.
Miller vs. Godard, 34 Me. 162.

I do not therefore consider the many other authorities furnished by counsel upon this question. I heartily agree with counsel for the defendant as to the law of the proposition. But what does the complaint in this case show? Is it an action for damage for unlawful discharge, or is it for constructive service? Counsel for the defendant seems to think the action is one for constructive service and not for damages for the unlawful discharge and violation of the terms of the contract of hire.

The complaint in this case, after setting out the terms of the contract of hire, the wages to be paid, and alleging that the plaintiff pursuant to the terms of the contract entered upon the discharge of his duties thereunder and fully performed said contract on his part until the 24th day of June, 1902, and was then and ever since has been ready, willing, and able to perform his duties as such superintendent under and pursuant to said contract; further alleges that on the 24th day of June, 1902, the defendant without cause and in violation of said contract discharged plaintiff from its employment and refused to further permit him to perform said contract. Then fol-

lows an allegation as to the peculiar nature of the contract of hire and the impossibility for the plaintiff to secure other employment of like character during the fishing season—all of which is perhaps unnecessary and is pleading evidence instead of ultimate facts necessary to the complaint. The complaint further shows that the plaintiff has been paid by the defendant all wages due up to the time of the discharge, and then follows the allegation that by reason of the breach of the contract by defendant, plaintiff has been damaged in the following sums: Loss of wages, $1,633.33; expenses for board and lodging, $410.00; expense return trip to Seattle, $25.00, making an aggregate of $2,068.33, and prays judgment for said sum with costs.

It may be said of that part of the complaint setting out the specific claim for loss of wages, etc., that it is an enumeration of the particular damages that plaintiff has sustained by the breach of the contract. This was an unnecessary allegation in the complaint, and like the other is a statement of evidential facts and not proper as an allegation. It is this part of the complaint that is perhaps somewhat misleading, and that counsel for defendant contends makes it an action for constructive services rather than an action, for a breach of the contract from the discharge of the plaintiff. It may be said perhaps that the complaint possesses a double aspect, and that the pleader at the time of drawing the complaint was not altogether sure of the law controlling the matter and stated such matters as he believed would entitled him to a recovery on either theory. I think a motion to strike out of the pleading all of those evidential facts following

the allegation as to the breach of the contract in discharging the plaintiff, might have been sustained.

So, comparing the complaint, or that part of it down to the allegation of the discharge and the wrongful breach of the contract with the precedents furnished in the law books, we find that it agrees with nearly all in stating a cause of action for a breach of the contract of hire, except in the allegations as to the amount of damages the plaintiff has received by reason of such breach, which is supplied in a later allegation. And while it is clear that the complaint presents this double aspect, it cannot be said that it does not state facts sufficient to constitute a cause of action even for a breach of the contract and a violation thereof by the unlawful discharge of the plaintiff by defendant. It is the opinion of the court, therefore, that this ground of the motion for new trial is not well taken.

The next ground that the court feels bound to consider is as to newly discovered evidence. This ground of the motion in this case is supported by affidavit and the claimed newly discovered evidence is set out in the affidavit at length. Now it is a well-settled rule of law that newly discovered evidence, to be available, (1), must have been discovered since the trial; (2) must not be merely cumulative, or (3) go to the impeachment of witnesses. This has been so frequently decided by the courts that a citation of authorities in support of the proposition is unnecessary. It becomes necessary, therefore, to determine whether there is anything presented in the affidavit in support of the motion for new trial; that is, in fact, newly discovered evidence.

The evidence on behalf of the defendant in this case on the trial consisted practically of an affidavit made by the attorney for the defendant which sets forth the matters which the absent witness J. D. Carroll would answer to if present in court. This affidavit is briefly as follows: "That the plaintiff instead of the defendant is guilty of breaking said contract of employment; that the plaintiff failed to comply with the terms of the contract on his part, and that he was not a competent and efficient man as he represented himself to be; that plaintiff was unable to perform the duties for which he was employed and that he failed and neglected to perform them and defendant was compelled to dispense with his services on that account; that the plaintiff was not prevented from securing other employment such as he was competent to perform, by reason of the acts of the defendant."

It will be observed that this affidavit goes largely to the competency of the plaintiff and to show that he was discharged by the defendant because he was unfit for the service for which he was employed, and the names of a number of witnesses who will swear to these facts are given. The affidavit of the defendant's counsel on which he went to trial plainly shows that the question of incompetency was raised, and went to the jury as evidence. Any other testimony therefore, bearing upon the same question, is cumulative and not newly discovered evidence since the trial, that could be received as bearing upon the right of defendant to a new trial at this time.

But among other matter stated in the affidavit is the fact that the plaintiff was intoxicated a very considerable portion of the time, and that his drunkenness rendered

him wholly unfit for the services he had undertaken to perform under the terms of the contract of hire.

As no evidence was offered on the subject of the drunkenness and intoxication of the plaintiff, that might under some circumstances be newly discovered evidence that would entitle the defendant to consideration on this motion. It is also stated that the plaintiff was insubordinate and disobedient to those placed over him and in charge of the business of the defendant at the time. This might also be considered newly discovered evidence under some circumstances. In Darst vs. Mathicoon Alkali Works, 81 Fed. 284, it is said:

"The use by a salaried employee of a corporation of insulting, disrespectful and abusive language to any officer or superior employee thereof in connection with the duties of the former, or his refusal to obey, or his advising other employees to disobey the orders of any superior, is ground for discharging him."

In McCormick vs. Demary, 7. N. W. Rep. 87, it is held that a master has a right, independent of an agreement to that effect to discharge his hired servant when, by intoxication he unfits himself for the full and proper performance of all his duties. But the question here is not whether drunkenness and insubordination of the plaintiff are grounds for discharge, but whether these matters as set up in the affidavit are newly discovered evidence. It is perfectly clear that counsel for the defendant at the time of the trial was not advised of the existence of this evidence or he would certainly have included it in his affidavit for continuance, and while they may be taken as matters beyond the knowledge of the defendant's coun-

sel at the time he made his affidavit for continuance, can it be said that they were not in the knowledge of the defendant company? Was not Carroll, the manager of the defendant, fully advised of all these facts when he discharged the plaintiff?

The affidavits filed clearly show that this knowledge was within the keeping of the general manager of the company at the time of the discharge of the plaintiff, and these were among the reasons, if not the chief reasons, that induced the general manager of the defendant company to discharge the plaintiff in this case. Can we say, then, that this is newly discovered evidence? Something that has been learned by the defendant—not by his attorney—since the trial of this case? The mere statement of the proposition is sufficient to show that this is not newly discovered evidence which comes within the purview of the statute so as to entitle the defendant's motion to be sustained on this ground.

But it is very earnestly urged in this case that the chief witness for the defendant, W. D. Carroll, could not be present at the trial; that he was hindered and delayed and unable to be present, and that because of this fact the case of the defendant practically went by default, and that the verdict obtained against the defendant is wrong and unjust, and for this reason judgment should be awarded to the plaintiff on the verdict returned by the jury. The showing made by the affidavit of Mr. Carroll as to his inability to be present, is not, in my opinion, such as entitles him or the defendant in this case to consideration at the hands of the court. Mr. Carroll claims that he went east on other important

business; that he was delayed in attending to this business; that he was delayed en route by reason of heavy snows, and all such matters. But the fact is the trial of this case was delayed for many weeks, 40 days, waiting for Mr. Carroll's return, and there is nothing in any of the circumstances that he presents that shows or tends to show that he might not have been present in Juneau had he made any effort to do so long before this case was tried, and that his failure to be here was purely a matter of neglect on his own part and on part of the company. If a man whose duty it is to attend to business in court goes somewhere else to attend to other duties that he thinks more important, when he does so he takes all of the risks of a judgment being entered against him because of his absence and the absence of his testimony that may be important to a defense. It seems to have been, in days gone by, a common practice in this court for men who had business at other points to pay no attention whatsoever to the business in court, but to go way to attend to other business without reference to matters pending in court. Whether this is true or not, or whether it has ever been, I do not know; but it is not true now. Men cannot go roving over the whole country without ever attempting to attend to cases they may have in court. It may as well be understood now, once and for all, that when a man has business pending in court for trial, they must be here on the ground ready for trial unless they can show the clearest excuse for not doing so. I do not consider that Mr. Carroll's affidavit furnishes any reasonable excuse for his absence. It simply shows that he chose to be somewhere else be-

cause he thought other business engagements were more important, and that is all it shows. The matters set up in the affidavit are not newly discovered evidence, and the only indication of merit is that it is stated Mr. Carroll was necessarily absent. As before stated, in my opinion, this does not cleary appear by the affidavit and is wholly inconsistent with the facts of this case as shown by the records.

The other grounds of the motion the court declines to consider because not stated specifically as required by the statute, save the question as to the insufficiency of the evidence; and on this latter ground the verdict cannot be disturbed.

The attorney for the defendant corporation seems to me to have done everything in aid of his client that an honorable attorney could do: first, to secure a continuance of the case, then on the trial of the same, and it is with regret that the Court feels compelled to overrule the motion for a new trial because of the Court's sympathy with the attorney who has so earnestly endeavored to save his client from the effects of the client's negligence and want of reasonable care for its own protection.

The motion for a new trial is overruled.

To which said ruling of the Court the defendant here and now excepts.

MELVILLE C. BROWN,
Judge.

[Endorsed]: No. 183-A. United States of America, District of Alaska, Division No. 1. In the United States

District Court, in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish & Lumber Company, Defendant. Decision of the Court on Motion for a New Trial. Filed May 6th, 1903. W. J. Hills, Clerk.

In the United States District Court in and for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,

vs.

No. 183-A.

ALASKA FISH AND LUMBER COMPANY,
Defendant.

Judgment.

This cause came on regularly for trial at the December term, 1903, of this court, on the 13th day of February, 1903. Messrs. Malony & Cobb appearing for the plaintiff, and Mr. W. E. Crews, for the defendant; and was tried to a jury duly selected, impaneled and sworn; and the jury, having heard the evidence, the arguments of counsel and the instructions of the Court, retired in charge of a bailiff to consider their verdict, and after due deliberation, returned in open court a verdict in favor of the plaintiff and assessed his damages at the sum of seventeen hundred and seventy-three dollars ($1773.00). And the defendant thereupon within due time filed a motion for a new trial, which said motion was taken under advisement by the Court, at said term

for further consideration; and the Court having fully now considered of said motion, and being fully advised in the premises, is of the opinion that the law is for the plaintiff.

It is therefore considered by the Court and so ordered and adjudged, that the said motion be, and the same is hereby, in all things, overruled.

And upon consideration of the trial and verdict of the jury aforesaid

It is considered by the Court and so ordered and adjudged that the plaintiff, Edward A. Chase, do have and recover, of and from the defendant, Alaska Fish and Lumber Company, a corporation, the sum of seventeen hundred and seventy-three dollars ($1773.00), with interest thereon from the said 13th day of February, 1903, at the rate of eight per centum per annum, and all costs in this behalf incurred taxed at ——— dollars, for all of which let execution issue.

Done in open court this May 6th, 1903.

M. C. BROWNE,
Judge.

[Endorsed]: 183-A. United States of America, District of Alaska, Division No. 1. In the United States District Court, in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. the Alaska Fish and Lumber Company, Defendant. Judgment. Filed May 6th, 1903. W. J. Hills, Clerk.

In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,

vs.

ALASKA FISH AND LUMBER COMPANY,
Defendant.

Petition for Writ of Error.

The above-named defendant conceiving itself aggrieved by the judgment in the above-entitled cause rendered therein on the 6th day of May, 1903, in favor of the plaintiff, and against the defendant; which said judgment and proceedings incident thereto are in many particulars erroneous, to the great injury and prejudice of your petitioner. Manifest error has been made in said cause, as fully appears from the assignment of errors, and bill of exceptions filed herewith.

Now, therefore, that your petitioner may obtain relief in the premises, and opportunity to show and have corrected the errors complained of, your petitioner prays that he be allowed a writ of error in said cause; and that upon giving your petitioner's bond, as required by law, that the judgment therein be superseded, and all proceedings be stayed, and execution withheld; and that a transcript of the record, and all papers in this case duly authenticated and be transmitted to the honorable

United States Circuit of Appeals for the Ninth Circuit, for the determination of said error.

(Signed) ALASKA FISH AND LUMBER COMPANY,
By W. E. CREWS,
Its Attorney.

Dated at Juneau, Alaska, this —— day of June, 1903.

[Endorsed]: Copy. In the United States District Court, for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Petition for Writ of Error.

In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Assignment of Errors.

Comes now the Alaska Fish and Lumber Company, and makes and files the following assignment of errors in the above-entitled cause; which, said defendant, and plaintiff in error, will rely upon in the Circuit Court of Appeals for the Ninth Circuit, for relief upon the judgment rendered in said cause in the court below.

1.

Because the Court erred in overruling defendant's de-

murrer to plaintiff's complaint, for the reason that the said complaint does not state facts sufficient to constitute a cause of action.

In this, the said plaintiff in his said complaint declares upon his contract for hire, and seeks to enforce the said contract as for constructive wages.

And, for the further reason, that the said contract upon its face shows that the defendant had the right under said contract to discharge the plaintiff at any time he proved to be unsatisfactory.

2.

The Court erred in his instructions to the jury wherein he instructed the said jury, "That the true rule as to the measure of damages if plaintiff is entitled to recover at all under the evidence and these instructions, would be the amount due on the contract from the first day of March up to the present time less the amount that has been paid. That is the true rule as to the measure of damages."

3.

The Court erred in refusing and denying the defendant's motion for a new trial; and for ordering judgment to be entered for the plaintiff.

And for errors assigned, and other manifest errors appearing in the record, the defendant Alaska Fish and Lumber Company prays that the judgment of the lower court be reversed, and this cause be remanded with instructions to grant a new trial.

ALASKA FISH AND LUMBER CO.,

Per W. E. CREWS,

Its Attorney.

[Endorsed]: Copy. In the United States District Court, for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Assignment of Errors.

In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Order Allowing Writ of Error.

Upon reading and considering of the petition of the defendant for writ of error in the above-entitled cause it is hereby ordered that the writ of error be allowed, and that all proceedings upon the judgment be stayed and further proceedings on execution be also stayed as prayed for, upon the plaintiff executing a good and sufficient supersedeas bond to prosecute said writ to effect, and moreover, pay all costs and damages sustained by the plaintiff if the defendant fail to make good its plea in the sum of twenty-five hundred dollars ($2500.00), to be approved by this Court.

MELVILLE C. BROWN,
Judge.

[Endorsed]: Copy. In the United States District Court for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendants. Order Allowing Writ of Error.

United States of America,
District of Alaska. } ss.

Writ of Error.

The President of the United States, to the Judge of the United States District Court, for the Disrict of Alaska, Division No. 1, at Juneau, Greeting:

Because in the record and proceedings, as was in the rendition of the judgment of the appellee which is in the said District Court before you between Edward A. Chase, plaintiff, and the Alaska Fish and Lumber Company, a corporation, defendant, a manifest error hath happened to the damage of the Alaska Fish and Lumber Company, as appears by its complaint; we being willing if such error, if any hath been, should be duly corrected, and full and speedy justice to the parties in this behalf do command you, if judgment be given therein, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said court, at the city of San Francisco, State of California, together with this writ, so that you may have the same at that place within thirty days from the date hereof, in said court, to be there and then held; that the record and proceedings, aforesaid, be inspected, and the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 18th day of June, A. D. 1903.

W. J. HILLS,
Clerk of the United States District Court for the District of Alaska, Division No. 1, at Juneau.

Let the foregoing writ issue.

MELVILLE C. BROWN,
Judge.

[Endorsed]: Copy. In the United States District Court, for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Writ of Error.

United States of America,
District of Alaska. } ss.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Citation.

To Edward A. Chase, Plaintiff in the Above-entitled Action, Greeting:

You are hereby cited and admonished to be and to appear before the United States Circuit Court of Ap-

peals for the Ninth Circuit, at the City of San Francisco, State of California, within thirty days after the date hereof, pursuant to a Writ of Error filed in the clerk's office of the United States District Court for the District of Alaska, Division No. 1, wherein the Alaska Fish and Lumber Company is plaintiff in error in said action, and you, Edward A. Chase, are the defendant in error, and plaintiff in said action, to show cause, if any there be, where the judgment in said writ of error should be corrected and speedy justice should be done to the parties in that behalf.

Dated this 18th day of June, 1903.

MELVILLE C. BROWN,

Judge of the United States District Court for the District of Alaska, Division No. 1, at Juneau.

I hereby acknowledge service of the above citation at Juneau, Alaska, this —— day of June, A. D. 1903.

MALONY & COBB,

Attorney for the Plaintiff.

[Endorsed]: Copy in the United States District Court, for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Citation.

In the United States District Court in and for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Bond on Writ of Error.

Know all men by thes presents, that we, the Alaska Fish and Lumber Company, a corporation, as principal, and Horace Cumminns, Frank Thayer and C. W. Young, as sureties, are held and firmly bound unto the above named Edward A. Chase in the sum of twenty-five hundred dollars ($2500.00) to be paid the said Edward A. Chase, for the payment of which, well and truly to be made, we bind ourselves, our executors and administrators firmly by these presents.

Sealed with our seals, and dated this 17th day of June, 1903.

The conditions of the above bond are such, that whereas, the above-named defendant, the Alaska Fish and Lumber Company, has prosecuted a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered and entered in the above-entitled cause by the United States District Court in and for the District of Alaska, Division No. 1, on the 6th day of May, 1903.

Now, therefore, the consideration of this obligation is such that, if the said Alaska Fish and Lumber Company shall prosecute its said writ to effect, and answer all damages and costs, if it fail to make good its plea, then the above obligation shall be void, otherwise to remain in full force and effect.

ALASKA FISH AND LUMBER COMPANY.
By W. E. CREWS,
Its Attorney.
HORACE CUMMINNS,
FRANK THAYER,
C. W. YOUNG,

Signed and sealed and delivered and taken and acknowledged this 17th day of June, 1903, before me.

W. J. HILLS,
Clerk of the United States District Court in and for the District of Alaska, Division No. 1.

The foregoing bond is hereby approved this 18th day of June, A. D. 1903.

MELVILLE C. BROWNE,
Judge.

[Endorsed]: No. 183-A. United States of America, District of Alaska, Division No. 1. In the United States District in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Bond on Writ of Error. Filed June 18th, 1903. W. J. Hills, Clerk.

In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Bill of Exceptions.

Be it remembered, that this cause came on for trial on the —— day of April, 1903, before the Honorable M. C. Brown, Judge of the above-entitled court, and a jury was duly impaneled and sworn to try the cause; said plaintiff appearing by Malony & Cobb, of counsel, and his attorneys, and the defendants appearing by W. E. Crews, their attorney.

Whereupon, the plaintiff, Edward A. Chase, was called and testified as witness in his own behalf, as follows:

E. A. CHASE, the plaintiff, being first duly sworn, on his oath testified as follows, on

Direct Examination.

(By Mr. COBB.)

State your name. A. Edward A. Chase.

Q. How old are you Mr. Chase?

A. Forty-nine the 6th day of last April.

(Testimony of E. A. Chase.)

Q. Where do you reside?

A. Seattle is my home at present.

Q. What is your occupation, and what has been your occupation for the last—well, a number of years?

A. Catching, curing, packing and handling fish.

Q. How long have you been engaged in that occupation? A. Thirty years.

Q. Tell the jury briefly in what capacities you have served in that business.

A. In 1873 I opened up and went into business in Portland, Maine, producing, catching, curing, buying and selling and handling fish, and was appointed deputy inspector by the Governor of the State. For thirteen years I carried on the business in Portland. In 1886 I lost my health and went to St. Paul, Minnesota, and after staying there a year I recovered my health and took charge of a department wholesale house for Baupre & Keough & Davis of St. Paul, had a contract with them for a year, and stayed with them two years.

Q. When did you come to the Pacific Coast?

A. Well, then I went back to St. Paul under contract with D. D. Mallary and the Laflin Company in charge of the A. or under the charge of the A. Booth Packing Co., and I remained with them a year, until my contract expired. After that contract expired, I took a position with Hartman, Clark & Co., of Chicago for one season. From that I returned to St. Paul again, as my wife's folks lived there and stayed for some time, and in 1892,

(Testimony of E. A. Chase.)

in December, I went to Tacoma to take charge of the Puget Sound Fish Co. and the Cresent Creamery's cold storage plant.

Q. And for what other concerns have you worked?

A. I carried on that business until the Cresent Creamery Co. closed out its business and I bought out the Puget Sound Fish Co. business and incorporated as the North Pacific Company and continued in that business for four years. Then I went in onto the head of the Spokane River and put in a trout fish hatchery, and my business during that time called me to different places, on to the Frazer River, Columbia, Puget Sound, and so on.

Q. State whether you are thoroughly familiar with taking, canning, and preparing for market food fishes such as salmon and other fishes. A. I am, sir.

Q. Do you know the defendant corporation in this case, the Alaska Fish and Lumber Company?

A. Yes, sir, I do.

Q. Examine that paper please—what is that (handing witness a paper writing)?

A. That's a contract I have with the Alaska Fish and Lumber Company.

Q. That the original contract? A. Yes, sir.

Q. That's your signature to the contract, is it?

A. Yes, sir.

Q. Is that also Mr. Carroll's signature, as general manager of that company? A. Yes, sir.

Q. Now, whose are the other signatures?

(Testimony of E. A. Chase.)

A. It was returned at my request for the other signatures to Mankato, and Mr. Wiedle and Mr. Farrell, I don't know their signatures personally.

Q. That contract was returned in due course of the mails? A. Yes, sir.

Q. And delivered to you as the original contract?

A. Yes, sir.

(Offered in evidence. No objection.)

(Marked Plaintiff's Exhibit "A.")

Q. Now, upon the execution of that contract, Mr. Chase, what did you do?

A. Why, I was to assist Mr. Carroll previous to March the first for a time, in anything that he had to do in Seattle in the way of helping him—which I did. And on—(producing memoranda) I always keep a diary and I ask permission to look in that for the dates?

Q. Those references there are to the dates of the occurrences?

A. Yes, sir, I kept a diary of everything that transpired in my employment.

Q. Well—

(Defendant objects to the witness reading from his diary. He may refresh his memory from it.)

COURT.—The witness may refresh his memory as to any matter appearing in the memoranda if it was made at the time.

A. It was made at the time. Mr. Carroll notified me that he was going to make a short run to Shakan, and

(Testimony of E. A. Chase.)

requested me to go with him and make the round trip and back with him in order to look over matters. He said there wasn't anything to do unless we did that, and couldn't anything be done very well until we made the trip. I left with him on the 16th of February and went to Shakan.

Q. Go ahead and tell the jury what else you did—giving the dates as near as you can?

A. We arrived in Shakan on the 24th day of February; and Mr. Carroll—we remained there for eight or ten days, and during that time why Carroll requested me to take up the business affairs, accounts, and so on and straighten up the business as they had just bought from Finn & Young and make a daily report to the Mankato office, checking up the bookkeeper's accounts and so on, which I did. When he went back he took the reports and said he wanted me to remain there in charge of the store business.

Q. Did you go back to Seattle? A. No, sir.

Q. Did you remain there in charge of the store?

A. Yes, sir, in charge of all the company affairs until—

Q. Of the cannery?

A. There was no cannery built at the time you see.

Q. There was one being erected?

A. No, sir, it hadn't been commenced yet.

Q. When did they begin building that?

A. About what the date was I don't recall now.

Q. Approximately?

(Testimony of E. A. Chase.)

A. Well, about March the 10th or 12th—I can tell you exactly from my book?

Q. Well, some time early in March?

A. Yes, sir.

Q. When was it completed?

A. Well, the carpenter work hadn't been completed when I left, yet?

Q. Not when you left in June? A. No, sir.

Q. And you remained there in charge as I understand it until the 24th day of June?

A. Twenty-third day of June he discharged me.

Q. During that time did you perform all your duties as superintendent, to the best of your ability?

A. I did, sir.

Q. State whether or not there had ever been any complaint made up to that time of your being negligent, or incompetent, by the officers of the Company?

A. Not a word, sir.

Q. Now, did Mr. Carroll at the time he discharged you, assign any such reason for so doing?

(Objected to as leading.)

A. No, sir.

(Objection sustained. Answer withdrawn.)

Q. Now when did Mr. Carroll return to Shakan?

A. The first time he went away?

Q. Yes?

A. He returned on April 25th, according to my dates.

(Testimony of E. A. Chase.)

Q. How long did he remain there then?

A. Until May the 4th.

Q. Where did he go then on May the 4th?

A. To Seattle.

Q. When did he return next? A. On the 10th.

Q. The tenth he returned?

A. No; I think he went down about the first, and then came back on the twenty-third.

Q. What reason, if any, did Mr. Carroll assign for discharging you?

A. For communicating the condition of affairs to the President and Secretary and Treasurer of the Company, at Mankato, Minnesota.

Q. Because of a report you made to them?

A. Yes, sir.

Q. Now, state whether or not that report had been called for by the head officials of that company?

(Objected to as immaterial. Objection sustained. Exception.)

Q. Did you make this report you speak of pursuant to a demand or request from the company that it should be made by you?

A. I wrote the president of the company a letter—

Q. Was that pursuant to the demand?

A. Yes, sir.

Q. State whether or not that was made in the course of the performance of your duties as superintendent of that cannery, and made as superintendent.

(Testimony of E. A. Chase.)

(Objected to as incompetent and immaterial under the pleadings, for the reason that the complaint sets up the discharge was not on account of any fault of his, and the answer states that it was on the ground of incompetency. It is not for them to show at this time whether or not—)

By Mr. COBB.—O, I agree with counsel that this is not the proper time for us to make that showing. It is properly rebuttal, and we will offer it as such at the proper time.

Q. Now, what was the reasonable value, Mr. Chase, of the board and lodging that was to be furnished you under this contract?

A. Well, of course at a place like that, it woul be over twenty-five or thirty dollars a month—at Shakan.

Q. What expense have you been put to in securing other board and lodging since?

(Objected to as immaterial. Objection sustained. Exception.)

Q. Now, Mr. Chase, state what it would cost to procure such board and lodging here in Alaska as the company furnished you down there—the reasonable cost?

A. I would say it would cost somewheres about fifty dollars a month.

Q. Have you been to that much expense?

(Objected to as immaterial. Objection sustained Exception.)

Q. Has the company paid any of your expenses for board or lodging since or expenses since?

(Testimony of E. A. Chase.)

A. No, sir.

Q. Have they paid you any salary since the 23d day of June? A. No, sir.

Q. Have they paid or offered to pay your return passage to Seattle? A. No, sir.

(No cross-examination.)

There being no cross-examination, after the plaintiff had read in evidence the contract declared upon in this action, which said contract is as follows, to wit:

This agreement made this 14th day of February, 1902, by and between the Alaska Fish and Lumber Company, a corporation incorporated under the laws of the Territory of Arizona, party of the first part and Edward A. Chase, of Seattle, Washington, party of the second part;

Witnesseth, that said party of the second part agrees with said party of the first part to work for said party of the first part as a superintendent or foreman, or in such other capacity as both parties hereto consent to for the term of one year, beginning March 1st, 1902, in the Territory of Alaska, or elsewhere in the United States as said party of the first part shall desire, and to well and faithfully devote his entire time, efforts and attention during said year to the services of the said party of the first part.

And in consideration thereof, said party of the first part agrees with said party of the second part that so long as he shall faithfully perform his duties in the services of the party of the first part hereunder, said party of the first part will bear and paying his traveling ex-

(Testimony of E. A. Chase.)

penses from Seattle, State of Washington, to Alaska, and return, providing the party of the second part remains in the services of the party of the first part for the term of one year as hereinafter stated and also pay, or furnish free to the party of the second part, board and lodging, and will further pay the party of the second part, the sum of $200.00 per month, payable monthly, and within thirty days after the end of each month.

It is understood and agreed that the party of the second part shall give his time from date until the first of March, 1902, to the party of the first part, without further consideration.

In witness whereof said parties have executed this agreement the day and year aforesaid.

ALASKA FISH AND LUMBER CO.,

By————————

E. A. CHASE, recalled on rebuttal.

Direct Examination.

(By Mr. COBB.)

Mr. Chase, just state how it is in this canning business, wherther it is customary in such business to employ the men—for what term?

(Objected to on the ground that the terms of the employment are merged in writing and therefore the writing is the best evidence. Immaterial and incompetent. Objection sustained.)

Q. State if after you were discharged down there you made any efforts to obtain employment elsewhere, of the

(Testimony of E. A. Chase.)

same or similar employment—same character, as that from which you were discharged from?

A. Yes, sir, I did, sir.

Q. Who did you go to?

(Objected to as immaterial. Objection overruled. Exception.)

A. I made application to Mr. Forbes of the Pacific Packing and Navigation Company., Mr. Barnes at Funter's Bay; and made application to Carlsen, and to Buschman; wrote to the Seattle people themselves, asking them if they had any position—the P. P. N. Co.

Q. Did you succeed in getting a position?

A. I did not.

EDWARD A. CHASE.

After some evidence had been introduced on behalf of the defendant, and the plaintiff having offered some in rebuttal, and the cause having been submitted to the jury, the Court, then gave the following instructions to the jury:

"Perhaps, I should state to you, further that the rule as to the measure of damages, if the plaintiff is entitled to recover at all under the evidence and these instructions, would be the amount due on the contract from the first day of March up to the present time, less the amount that has been paid. That is the true rule as to the measure of damages, although the way I stated it before would amount, perhaps, to the same thing in the end."

To the giving of which instructions, the defendant then and there excepted, and his exception was by the Court duly allowed.

ORAL INSTRUCTIONS OF THE COURT.

CHASE
vs.
ALASKA FISH AND LUMBER CO.

Gentlemen of the Jury: You have in evidence before you a contract of hire for personal services of the plaintiff. I believe under the terms of the contract he was to be paid two hundred dollars per month, with board and his expenses I believe to and from the place where he was to work; that is his expenses from Seattle to and from the place he was to work—provided, of course, he should fulfill the terms of his contract.

Under such a contract, the rights of the party hired and the party hiring are practically this: If the party who agrees to furnish his services is not fairly treated; if he is prevented from performing the service he agrees to by the improper conduct of the party hiring, he may quit the service he has agreed to perform. On the other hand, when a party hires to perform a certain service for another, he is presumed in law to be qualified for the service upon which he agrees to enter. He is presumed to be competent to render the service he agrees to perform. If he fails; if he is incompetent or negligent in the performance of such services, the employer may discharge him. The rights of both parties are mutual. The employee may decline to perform services when he is not treated

as an employee should be, and where he is hindered in the performance of the service required; and there is no recourse against him. If he fails through negligence or incapacity, and the master discharges him, he has no recourse against his employer.

The claim made here on the part of the plaintiff is that there was a contract of hire, which was proved by the submission of the contract of hire; that the plaintiff was competent for the service; that he was wrongfully discharged, and being wrongfully discharged he has a right of action for damages. The law gives him such right of action for damages if what he says in his complaint is true and that is proved by the weight of the evidence. On the other hand, it is alleged in the answer that he was incompetent, negligent and failed to perform the service required under the contract of hire. If that is true, and that proposition is proved by the weight and preponderance of the evidence, the plaintiff has no right to recover in this action.

Whichever party to an action alleges an affirmative proposition, must sustain that allegation by the weight or preponderance of the evidence.

You are the judges of the credibility of witnesses, and the weight to be given the testimony of each of them. What is proved or shown by the evidence, is a matter wholly for your determination. You are not to accept any man's statement as true simply he swears to a state of facts. You are bound to accept each man's statement from the stand under oath as equal to every other man's statement. You may judge from the appearance of people on the stand before you, the manner in which they

give their testimony, whether with candor and apparent honesty, or otherwise; but you should throw no man's testimony aside without reason, or upon any caprice; but you should consider the statement of every man fairly according to his situation as you find it, and weigh it accordingly.

It is sometimes claimed, and it is stated as a proposition of law, that a man who is interested in the result of an action may not be always as truthful and as reliable and as worthy of belief as if he were disinterested; but it sometimes happens that there are men who, notwithstanding their interest, always speak the truth. But you are to determine, as before stated, the weight to be given the testimony of the witnesses.

Mr. Carroll is not present as a witness to testify before you; but under the law, it has been agreed that his statement as read to you should be accepted in place of his testimony if he were here. And under these circumstances you are to receive this statement of fact as made just as if it had been received from the mouth of the witness Carroll. It is admitted that he would swear to these things if he were presonally present and testifying. You are therefore to receive this statement as his testimony, the same as if he were testifying in person from the stand.

Now if you find that this plaintiff is entitled to recover under the evidence before you, it is proper that the Court should give you what under the law is termed a "measure of damages." Before doing so however, I wish to state to you another proposition: Whatever may have been said by the chief officer of the company defendant, as to the cause of the discharge by the superintendent of the com-

pany that is not the only ground of discharge that may be proved in the trial of a case; and the defendant in this case is not bound by that declaration only so far as it may evince a reason for the discharge. Whatever real reason there may have been for the discharge outside of that declaration, may be proven on this trial; hence I have stated to you that if it was proved that the plaintiff was incompetent and negligent of his duties that he might rightfully be disharged as alleged in the answer. So that you are not to consider the declaration alone, but all the evidence in the case bearing upon that question.

Now, as to the measure of damages: That is what the defendant agreed to pay this man—if he has a right to recover at all, viz., two hundred dollars per month and his board. If there were proof upon the question, he would be entitled to the expense of a return trip to Seattle because that as I understand it is a part of the contract Now for what time may he recover? The allegation of the complaint is that they or he was damaged by reason of the discharge and consequent violation of the contract of hire. If the plaintiff had waited until the end of the year specified in his contract of hire, he might recover for the whole term mentioned in the contract—if entitled to recover at all. But the question now is, what was the damage he sustained by reason of such discharge? What the future holds in store for any one, no one can tell. If a man were sick, or should he die, that would terminate his contract of hire and he could recover nothing beyond that period. We are all liable to die at most any time so uncertain is the future that to say a man will live fo any time and may recover damages up to any time in

the future, is a proposition that is too uncertain to constitute a measure of damages. Evidence has been offered in this case on the part of the plaintiff, without objection, that he had made an effort to obtain employment from the time of his discharge I believe, up to the present time; and that he had been unable to secure employment. Because of that declaration, uncontradicted and coming before the Court and jury without objection, I say to you the measure of damages in this case if the plaintiff recovers and you find he is so entitled to do, is the wages he was to receive from the time he was paid off up to the present time, the date of this trial; and such damages for board during the meantime as he is entitled to under the evidence before you.

As to the character of the evidence upon the question of board, you will recall what that is. The defendant did not state what the expense of board was at Shakan but what the expense had been to him, viz., fifty dollars a month. He stated perhaps in the first place that the board down there might cost the company perhaps twenty-five to thirty dollars per month; but it is for you to determine under the evidence just what he is entitled to, and you are to recall just what the evidence was on this point. And if there is any evidence before you—I frankly state I do not recall any—as to the expense of a passage back from Shakan to Seattle, the plaintiff under his contract of hire is entitled to recover that and you should so find.

Perhaps I should state to you further, that the true rule as to the measure of damages, if the plaintiff is entitled to recover at all under the evidence and these in-

structions, would be the amount due on the contract from the first day of March up to the present time, less the amount that has been paid. That is the true rule as to the measure of damages, although the way I stated it before would amount perhaps to the same thing in the end.

Now, I believe I have stated to you the law governing contracts of this kind, and the circumstances under which a party may quit and under which he may be discharged. If you find from all the evidence before you that the plaintiff was discharged without reasonable cause, you should find for the plaintiff such damages as he has sustained by reason of such discharge. If you find that he was rightfully discharged becaue of a failure to perform his duties from neglect in that behalf, your verdict should be for the defendant.

The above and foregoing bill of exceptions was presented to me on the 17th day of June, 1903, within the time allowed by law, and the rules of this court.

Now, therefore, I, MELVILLE C. BROWN, Judge before whom said cause was tried, do hereby settle and allow the same as a correct bill of exceptions, and do order that the same be filed and made a part of the record herein.

Done in open court, Juneau, Alaska, this 18th day of June, 1903.

MELVILLE C. BROWN,

Judge of the United States District Court for the District of Alaska, Division No. 1.

[Endorsed]: Original. In the United States District Court for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendants. Bill of Exceptions.

In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendants.

Order Extending Time to Docket Cause.

It appearing to the Court from the examination of the record in this cause that the time for preparing the record and docketing the cause in the Circuit Court of Appeals pursuant to the writ of error heretofore granted will expire on the 18th day of July, 1903, and that additional time should be granted to the clerk for the preparation and the docketing of the cause:

It is therefore ordered that the time for preparing said record and transmitting the same to the clerk of the Cicuit Court of Appeals be, and the same is hereby, extended 60 days from the 18th day of July, 1903.

It is further ordered, upon request of the plaintiff in error, that the record in this cause may be prepared by the attorneys for the plaintiff in error presented to the

clerk of this court for examination, comparison and approval.

July 13, 1903.

M. C. BROWN,
Judge.

[Endorsed]: Copy. In the United States District Court, for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendants. Order Extending Time.

In the United States District Court in and for the District of Alaska, Division No. 1, at Juneau.

United States of America,
District of Alaska. } ss.

Clerk's Certificate to Transcript.

I, W. J. Hills, clerk for the United States District Court in and for the District of Alaska, Division No. 1, do hereby certify that the above and foregoing hereunto annexed 65 pages are a full, true and correct transcript of the records and files of all the proceedings in the therein mentioned cause of Edward A. Chase vs. Alaska Fish and Lumber Company, as the same appears of record and on file in my office; and that the same is in accordance with the command of the writ of error in said cause allowed.

This transcript has been prepared by the plaintiff in error, and the costs of examination and the certificate of examination amounting to the sum of 6.35 dollars have been paid to me by the plaintiff in error.

I further certify that a copy of the writ of error in the above-entitled cause was lodged in this office for the use of the defendant in error on the 17th day of June, 1903, before the return day of said writ; and was by me duly delivered to the attorneys for the defendant in error.

In testimony whereof, I have hereunto set my hand and caused the seals of the court to be hereunto affixed at Juneau, on this 23d day of July, 1903.

[Seal] W. J. HILLS,

Clerk of the United States District Court, in and for the District of Alaska, Division No. 1.

United States of America, } ss.
District of Alaska. }

Writ of Error.

The President of the United States, to the Judge of the United States District Court for the District of Alaska, Division No. 1, at Juneau, Greeting:

Because in the record and proceedings, as was in the rendition of the judgment of the appellee which is in the said District Court before you between Edward A. Chase, Plaintiff, and the Alaska Fish and Lumber Company, a corporation, Defendant, a manifest error hath happened to the damage of the Alaska Fish and Lumber Company, as appears by its complaint; we being willing if such error, if any hath been, should be duly corrected, and full and speedy justice to the parties in this behalf do command you, if judgment be given therein, that un-

der your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the court-room of said court, at the city of San Francisco, State of California, together with this writ, so that you may have the same at that place within thirty days from the date hereof, in said court, to be there and then held; that the record and proceedings, aforesaid, be inspected, and the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 18th day of June, A. D. 1903.

[Seal] W. J. HILLS,
Clerk of the United States District Court for the District of Alaska, Division No. 1, at Juneau.

Let the foregoing writ issue.

MELVILLE C. BROWN,
Judge.

[Endorsed]: Original. No. 183-A. In the United States District Court for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Writ of Error. Filed June 18, 1903. W. J. Hills, Clerk.

United States of America,
District of Alaska. } ss.

EDWARD A. CHASE,
Plaintiff,

vs.

ALASKA FISH AND LUMBER COMPANY,
Defendant.

Citation.

To Edward A. Chase, Plaintiff in the Above-entitled Action, Greeting:

You are hereby cited and admonished to be and to appear before the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, within thirty days after the date hereof, pursuant to a writ of error filed in the clerk's office of the United States District Court for the District of Alaska, Division No. 1, wherein the Alaska Fish and Lumber Company is plaintiff in error in said action, and you, Edward A. Chase, are the defendant in error, and plaintiff in said action, to show cause, if any there be, where the judgment in said writ of error should be corrected, and speedy justice should be done to the parties in that behalf.

Dated this 18th day of June, 1903.

MELVILLE C. BROWN,
Judge of the United States District Court for the District of Alaska, Division No. 1, at Juneau.

I hereby acknowledge service of the above citation at Juneau, Alaska, this 19 day of June, A. D. 1903.

MALONY & COBB,
Attorney for the Plaintiff.

[Endorsed]: Original. No. 183-A. In the United States District Court for the District of Alaska, Division No. 1. Edward A. Chase, Defendant, vs. Alaska Fish and Lumber Company, Plaintiff. Citation. Filed June 18, 1903. W. J. Hills, Clerk.

[Endorsed]: No. 983. In the United States Circuit Court of Appeals for the Ninth Circuit. Alaska Fish and Lumber Company, Plaintiff, in Error, vs. Edward A. Chase, Defendant in Error. Transcript of Record Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

Filed August 21, 1903.

F. D. MONCKTON,
Clerk.

No. 983

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ALASKA FISH AND LUMBER COMPANY,
Plaintiff in Error,

vs.

EDWARD A. CHASE,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

W. E. CREWS,
Attorney for Plaintiff in Error.

LORENZO S. B. SAWYER,
of Counsel.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

ALASKA FISH AND LUMBER COMPANY,
Plaintiff in Error,
vs.
EDWARD A. CHASE,
Defendant in Error.
No. 983.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This is a writ of error to a judgment in favor of defendant in error, plaintiff in the court below, in an action on a contract of employment by plaintiff in error, defendant in the court below, in its fishing and cannery business in Shakan, Alaska, for one year from March 1, 1902, for a consideration of $200 per month, board and lodging and expenses in traveling to and from Seattle, Washington, and Alaska.

The following is a copy of the complaint:

"*In the United States District Court, in and for the District of Alaska, Division No. 1, at Juneau.*

EDWARD A. CHASE,
Plaintiff,

vs.

ALASKA FISH AND LUMBER COMPANY,
Defendant.

Complaint.

Now comes the above-named plaintiff, and for cause of action against the above-named defendant alleges:

1.

That defendant is a corporation duly incorporated under the laws of the territory of Arizona, but doing business and having property within the District of Alaska, Division No. 1.

2.

That plaintiff is now, and has been for many years a fisherman, engaged in the business of superintending the taking, canning, and otherwise preparing for the market, salmon and other fish in large quantities; and such business is his calling and vocation in life.

3.

That, heretofore, to wit, on the 14th day of February, 1902, the plaintiff and defendant made and entered into a contract and agreement wherein and whereby the

defendant employed the plaintiff for the period of one year, beginning March 1, 1902, as superintendent, or foreman, for defendant in its fishing and canning business, at an agreed and stipulated consideration to be paid by defendant, of $200 per month, board and lodging for the said year, and expenses in traveling to and from Seattle, Washington, to Alaska. A copy of said contract is hereto attached, marked Exhibit "A" and made a part hereof.

4.

That immediately after the execution of said contract, the plaintiff pursuant to said contract, and the directions of the defendant, came to Shakan, Alaska, and took charge as superintendent of the defendant's salmon canning establishment at that place. That thereafter plaintiff faithfully performed all the duties required of him as such superintendent, and fully performed his part of said contract until the 24th day of June, 1902; and was then and has ever since been ready, willing and able to perform his said duties as such superintendent under and pursuant to said contract.

5.

That on the said 24th day of June, 1902, defendant, without cause and in violation of said contract, discharged plaintiff from his employment, and refused to permit him to perform further said contract.

6.

That the said business mentioned above is of such a nature that it is customary and necessary to secure employment therein by the year or for the whole sea-

son of fishing and canning, and plaintiff, although he has endeavored so to do, has not been able, and will not be able, prior to the beginning of the next season of fishing, to wit, about March 1, 1903, to secure any employment and will, during the whole period from June 24, 1902, to March 1, 1903, be left without employment and compelled to support himself at his own expense.

7.

That defendant has only paid plaintiff the sum of $766.66 on his wages due, and to become due under said contract, and refuses to pay plaintiff's expenses to Seattle, or to pay his board and lodging from and after said 24th day of June, 1902; that, by reason of the breach of contract by defendant as aforesaid, plaintiff has been damaged in the following sums, to wit:

For loss of wages	$1,633.33
Expenses for board and lodging	410.00
Expenses return trip to Seattle	25.00
Making an aggregate of	2,068.33

Wherefore, plaintiff prays judgment against defendant for the sum of two thousand sixty-eight and 33-100 ($2,068.33), together with costs herein incurred.

MALONY & COBB,
Attorneys for Plaintiff."

(Record, 1-3.)

The following is a copy of the contract declared on in this action:

"This agreement made this 14th day of February, 1902, by and between the Alaska Fish and Lumber Company, a corporation, incorporated under the laws of the Territory of Arizona, party of the first part, and Edward A. Chase, of Seattle, Washington, party of the second part, witnesseth: That said party of the second part agrees with said party of the first part to work for said party of the first part as a superintendent or foreman, or in such other capacity as both parties hereto consent to, for the term of one year, beginning March 1, 1902, in the Territory of Alaska, or elsewhere in the United States, as said party of the first part shall desire, and to well and faithfully devote his entire time, efforts and attention during said year to the services of the said party of the first part. And in consideration thereof, said party of the first part agrees with said party of the second part, that, so long as he shall faithfully perform his duties in the services of the party of the first part hereunder, said party of the first part will bear and pay*ing* his traveling expenses from Seattle, State of Washington, to Alaska, and return, providing the party of the second part remains in the services of the party of the first part for the term of one year as hereinafter stated, and also pay, or furnish free to the party of the second part, board and lodging, and will further pay the party of the second part the sum of $200 per month, payable monthly, and within thirty days after the end of each month.

It is understood and agreed that the party of the second part shall give his time from date until the first

of March, 1902, to the party of the first part, without further consideration.

In witness whereof, said parties have executed this agreement the day and year aforesaid.

ALASKA FISH AND LUMBER COMPANY,

By ————————."

(Record, 50, 51.)

A demurrer was interposed to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, which having been overruled an answer was filed, and the case was tried by a jury, which found a verdict for plaintiff, and assessed his damages at the sum of $1,773.00. Whereupon, after denying a motion made by defendant for a continuance and another for a new trial, the Court gave judgment for said sum, with interest and costs. (Record, 4-8, 11-13, 16-30, 31, 32.)

Defendant filed its assignment of errors and prayer for reversal, and the case is now here for review and correction upon a writ of error duly sued out and allowed.

SPECIFICATIONS OF ERRORS.

The assignment of errors is, in substance, as follows:

1.

The Court erred in overruling defendant's demurrer to plaintiff's complaint, for the reason that the said complaint does not state facts sufficient to constitute a cause of action, in this: The said plaintiff in his said complaint declares upon his contract for hire and seeks to enforce the said contract as for constructive wages. And for the further reason, that the said contract upon

its face shows that the defendant had the right, under said contract, to discharge the plaintiff at any time he proved to be unsatisfactory.

2.

The Court erred in its instructions to the jury wherein he instructed the said jury, "That the true rule as to the measure of damages, if plaintiff is entitled to recover at all under the evidence, and these instructions, would be the amount due on the contract from the first day of March up to the present time, less the amount that has been paid. That is the true rule as to the measure of damages."

3.

The Court erred in refusing and denying the defendant's motion for a new trial; and in ordering judgment to be entered for the plaintiff.

And for errors assigned, and other manifest errors appearing in the record, the defendant, the Alaska Fish and Lumber Company, prays that the judgment of the lower court be reversed, and that this cause be remanded with instructions to grant a new trial.

ALASKA FISH AND LUMBER CO.,

Per W. E. CREWS,

Its Attorney.

ARGUMENT.

1.

Upon our first assignment and specification of error, we cannot do better than quote the court below in its "Decision on Motion for a New Trial." (Record 16-30.)

This "is equivalent to a general demurrer to the complaint on the ground that the same does not state facts sufficient to constitute a cause of action in support of this ground of the motion" (and objection to the complaint's validity, as also to the jurisdiction of the court, can be raised at any stage of the case. See Cal. Code Civ. Proc., sec. 434, and cases cited in note). "Counsel for defendant argued with great vigor and earnestness that the complaint is a claim for labor and services, and not for damage for breach of contract, and cites James vs. Allen County, 44 Ohio St. 226. S. C. 58 Am. Rep. 821. This case holds in effect that 'Where a servant is wrongfully discharged, but his wages are paid up to that time, he cannot recover for future installments, but only for breach of contract.' * * * The doctrine of constructive service for which suit could be brought lawfully, as it is claimed, at one time in England and in some of the states of the United States, seems to have been overturned as the law of England and mainly so in the states of the Union. It is said in Moody v. Leverich, 4 Daly (N. Y.), 401, that a servant wrongfully dismissed cannot wait until the expiration of the period and sue for his whole wages on the ground of constructive service, his only remedy being an action on the contract for hire. (Howard vs. Daly, 61 N. Y. 362, S. C. 19 Am. Rep. 285.) It would seem that Alabama, Mississippi, Missouri, and Wisconsin" (we add, Arkansas, Colorado, Georgia, Illinois, Indiana, Kentucky, Maine, Minnesota, New York, North Carolina, Ohio, Pennsylvania, Vermont and Virginia), "disapprove the doctrine of constructive service. Without

further consideration of this question, it is deemed sufficient to say that the great weight of authority now is, that suit for constructive services under such conditions as are presented in the case at bar, *cannot be maintained.* (Chamberlain vs. Morgan, 68 Pa. St. 168; Willoughby vs. Thomas, 24 Gratt. (Va.) 522; Chamberlin vs. McCallister, 6 Dana (Ky.), 352; Whitaker vs. Sandifer, 1 Duvall (Ky.), 261; Miller vs. Goddard, 34 Me. 102; S. C. 56 Am. Dec. 638." (Record, 21-23.)

A servant discharged before the expiration of his term of service cannot recover on the *theory of constructive service,* but must claim damages for his discharge, This rule of law is thoroughly discussed in the American and English Encyclopedia of Law in both the first and the second editions, under the head of "Master and Servant," and especially in the first volume of the second edition of that work on page 1104, under the head of "Agency"; and many adjudicated cases, both English, state and federal, are cited. The rule laid down there is as follows: An agent or servant wrongfully discharged has but two remedies growing out of the wrongful act: First, he may rescind the contract, in which case he may sue immediately on a *quantum meruit* for services actually rendered; or, Secondly, he may treat the contract of employment as continuing, though broken by the principal, and may recover damages for the breach.

To save the Court the trouble of consulting this dictionary of law, we quote the authorities cited in it:

Under quantum meruit—Britt vs. Hays, 21 Ga. 157; Rogers vs. Parham, 8 Ga. 190; Howard vs. Daly, 61 N.

Y. 362, 19 Am. Rep. 285; Brinkley vs. Swingood, 65 N. C. 625; Pooge vs. Pac. N. Co., 33 Mo. 215, 82 Am. Dec. 160; Derby vs. Johnson, 21 Vt. 17; Moody vs. Leverich, 4 Daly (N. Y.), 401.

Under damages for breach of contract—England: Goodman vs. Pocock, 15 Q. B. 576, 69 E. C. L. 576.

Alabama: Strauss vs. Meertief, 64 Ala. 299, 38 Am. Rep. 8.

Arkansas: Gardenhire vs. Smith, 39 Ark. 280.

Colorado: Saxonia Min. etc. Co. vs. Cook, 7 Colo. 569.

Georgia: Britt vs. Hays, 21 Ga. 157; Rogers vs. Parham, 8 Ga. 190.

Illinois: Williams vs. Chi. Coal Co., 60 Ill. 149.

Indiana: Richardson vs. Eagle Mach. Works, 78 Ind. 422, S. C., 41 Am. Rep. 584.

Kentucky: Chamberlin vs. McCallister, 6 Dana (Ky.), 352.

Maine: Miller vs. Goddard, 34 Me. 102; S. C., 56 Am. Dec. 638.

Minnesota: Horn vs. W. La. Assn., 22 Minn. 233.

Missouri: Pooge vs. Vincent, 7 Mo. App. 277; Ream vs. Watkins, 27 Mo. 516, 72 Am. Dec. 283; Lewis vs. Atlas Mut. L. Ins. Co., 61 Mo. 534.

New York: Howard vs. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Moody vs. Leverich, 4 Daly (N. Y.), 401.

North Carolina: Brinkley vs. Swingood, 65 N. C. 626; Hendrickson vs. Anderson, 5 Jones (N. C.), 246.

Ohio: James vs. Allen Co., 44 Ohio St. 226, 58 Am. Rep. 821.

Vermont: Derby vs. Johnson, 21 Vt. 17.

Virginia: Willoughby vs. Thomas, 24 Gratt. (Va.) 521.

Under the rule applicable in the case at bar, Chase, plaintiff, could only recover damages for the breach of his contract. The Court will see, however, from the record, that he did not proceed upon that theory, but attempted to recover as for constructive wages earned. In the 7th paragraph of his complaint, he states that he has only received $766.66 on his wages *due and to become due* under said contract, and in the same paragraph "for loss of wages, $1,633.33." And in his testimony on page 50 of the record, he was asked: "Have they paid you any salary since the 23d day of June?" To which he answered: "No." In the instruction complained of on page 57 of the record, the Court instructs the jury that the true rule as to the measure of damages is the amount *due on the contract.* Therefore, the complaint, proof, and the instructions of the Court all go to show that this action was brought and tried upon the theory of constructive wages. And the cases all hold that a party cannot, in an appellate court, change the theory on which his case was tried in the lower court, any more than he can change his cause of action or his defense. And it is no part of the duty of a Court or judge, to "read between the lines" of a pleading to make it "firm and good." He who tries to ride two horses at once, or sit on two stools, generally falls off between them. Besides, plaintiff admits having been paid in full for his services *actually rendered*, and the contract upon its face shows that the defendant had the right, under said contract, to discharge plaintiff at any

time he proved unsatisfactory. (See contract, supra.) It is the duty of the trial court to construe any contract declared upon, and of the appellate court to set the lower court and its jury right, if they have "gone wrong."

2.

The second error asserted and urged relates to the court's instruction to the jury, "That the true rule as to the measure of damages, if plaintiff is entitled to recover at all, under the evidence, and these instructions, would be the amount due on the contract from the first day of March up to the present time, less the amount that has been paid. That is the true rule as to the measure of damages."

The error in this instruction is that the amount due on the contract *is not the true rule.* The true rule in this case is the amount of the contract less what the plaintiff might have earned by the exercise of due diligence in securing other employment of a similar nature.

"The principle which measures damages" (for breach of contract) "at common law, is that of giving compensation for the injury sustained. * * * But in some instances, the law lessens this compensation, leaving upon the injured party a part of his loss; and in others, increases the compensation, by way of punishment to the wrongdoer." (3 Par. Con., 5th ed., 155.)

There is no question nor claim for exemplary damages here. Our California Civil Code, which is supposed to crystallize the common law, provides in sections 3300 and 3301 as follows:

"Sec. 3300. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.

"Sec. 3301. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." (See F. & T. L. Co. vs. Miller, 67 Cal. 464, 467.) The complaint in this case may be true and yet the plaintiff have been much benefited by the dismissal. Was not the instruction clearly misleading? The verdict shows that the jury simply calculated the amount and based its verdict upon the contract as for wages earned.

3.

The Court erred in denying the defendant's motion for a continuance and afterward for a new trial. The motion for a continuance was not specially assigned for error.

The motion for a continuance and the motion for a new trial were, of course, addressed to the discretion of the trial court, and it is well settled that matters of discretion or practice cannot, generally speaking, be made the basis of an appeal or writ of error, unless this discretion was abused. The only record we have here of these two motions is found in the "Decision of the Court on Motion for a New Trial" (Record, 16-30.); "but

the Court, at its option, may notice a plain error not assigned."

If this Court is of opinion that this case ought to have been continued, or a new trial granted, to enable defendant to prove incompetency, unfitness and habitual intoxication on the part of the plaintiff (Record, 26, 27), it will, to the end that injustice may not be done, reverse the judgment herein and send the case back for a new trial. *Ld. v. Rio Grande Dam & Irr. Co. et al. 184 U.S.*

Respectfully submitted,

W. E. CREWS,

Attorney for Plaintiff in Error.

LORENZO S. B. SAWYER,

Of Counsel.

NO. 983

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ALASKA FISH & LUMBER COMPANY,
Plaintiff in Error,
vs.
EDWARD A. CHASE,
Defendant in Error.

Upon Writ of Error to the United States District Court, for the District of Alaska, Division No. 1.

BRIEF OF DEFENDANT IN ERROR.

MALONY & COBB,
Attorneys for Defendant
in Error.

DAILY RECORD-MINER, JUNEAU.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

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ALASKA FISH & LUMBER COMPANY,
Plaintiff in Error,
vs.
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Defendant in Error.
983

Upon Writ of Error to the United States District Court, for the District of Alaska, Division No. 1.

BRIEF OF DEFENDANT IN ERROR.

MALONY & COBB,
Attorneys for Defendant
in Error.

Statement of the Case.

We will not attempt a reply to the Brief of the Plaintiff in Error, (it has not been served, and probably will not be in time for us to answer it,) but will

endeavor to show that the judgment of the court below is right and should be affirmed.

The action was for the breach of a contract of hiring. It was alleged that the plaintiff was by occupation a fisherman, skilled in the work of taking, canning, and otherwise preparing salmon and other fish in quantities for the market, that on February 14th, 1902, he was employed by the defendant as superintendent of its cannery, for a year, beginning March 1st, 1902, at a stipulated wage of $200.00 per month, board, and expenses to and from Seattle to the cannery at Skokan, Alaska; that plaintiff immediately entered upon the duties of his employment and faithfully performed the same until the 24th day of June, 1902, when he was without cause discharged, in violation of said contract; that the plaintiff had endeavored to secure other employment but was unable to do so, because of the nature of the business of fishing, whereby canning men employ their men by the year or season; and alleged damages in the sum of $2,068.33. (Rec. 1—3.) The defendant answered, admitting the contract, but justified the discharge on the ground of plaintiff's alleged incompetency, want of skill, and negligence; and a settlement in full of all claims, and a release in writing for the same. (Rec. p. 6—8.) The reply put in issue the allegations of the answer. (Rec. 9.) The case was tried to a jury, and resulted in a verdict for plaintiff for $1,773. Motion for new trial was made, and overruled, and judgment entered on the verdict.

The Assignments of Error.

There are three.

I.

This assignment challenges the action of the lower court in overruling the defendant's demurrer to the complaint. The demurrer is general, that the complaint does not state facts sufficient to constitute a cause of action. (Rec. 4—5.) The contention of the defendant under this assignment is that the complaint declares upon a contract of hire and seeks to recover for constructive wages. The contention seems to us frivolous, but it was urged with great earnestness upon the lower court, and was fully considered by it, in an able opinion found in the record. We feel that we can do no better than to refer the court to that part of the opinion dealing with this question, beginning on page 21 of the printed record, and ending on page 25, and adopt the same as our argument thereon.

II.

This assignment challenges the correctness of the following clause of the court's charge on the measure of damages, viz, "That the true rule as to the measure of damages if plaintiff is entitled to recover at all, under the evidence and these instructions, would be the amount due on the contract from the 1st day of March up to the present time, less the amount that has been paid. That is the true rule as to the measure of damages."

This clause, standing alone, might be susceptible of criticism, but taken into conjunction with the

undisputed facts and the context of the charge given, it correctly stated the law. The plaintiff testified (Rec. 51—52) to making all reasonable efforts to secure other employment after his discharge and his failure to do so. The court's charge on the measure of damages is as follows:

Now, as to the measure of damages: That is what the defendant agreed to pay this man—if he has a right to recover at all, viz: two hundred dollars per month and board. If there were proof upon the question, he would be entitled to the expense of a return trip to Seattle, because, as I understand, it is a part of the contract. Now, for what time may he recover? The allegation of the complaint is that they or he was damaged by reason of the discharge and consequent violation of the contract of hire. If the plaintiff had waited until the end of the year specified in his contract of hire, he might recover for the whole term mentioned in the contract—if entitled to recover at all. But the question now is, what was the damage he sustained by reason of such discharge? What the future holds in store for any one, no one can tell. If a man were sick, or should he die, that would terminate his contract of hire and he could recover nothing beyond that period. We are all liable to die at most any time, so uncertain is the future, that to say a man will live for any time and may recover damages up to any time in the future, is a proposition that is too uncertain to constitute a measure of damages. Evidence has been offered in this case on the part of plaintiff, without objection, that he had

made an effort to obtain employment from the time of his discharge, I believe, up to the present time; and that he had been unable to secure employment. Because of that declaration, uncontradicted and coming before the court and jury without objection, I say to you, the measure of damages in this case, if the plaintiff recovers, and you find he is so entitled to do, is the wages he was to receive from the time he was paid off up to the present time, the date of this trial; and such damages for board during the meantime, as he is entitled to under the evidence before you.

"Perhaps, I should state to you further, that the true rule as to the measure of damages, if the plaintiff is entitled to recover at all under the evidence and these instructions, would be the amount due on the contract from the first day of March up to the present time, less the amount that has been paid. That is the true rule as to the measure of damages, although the way I stated it before would amount perhaps to the same thing in the end." (Rec. 56—58.)

This instruction, we submit, correctly stated the law.

Leatherberry vs. Odell, 7 Fed., 642.

Park Bros. vs. Bushnell, 60 Fed., 582.

Saxonia Mining Co. vs. Cook, 4 Pac. Rep., 1111.

In Leatherberry vs. Odell, Dick J. instructed the jury that where the defendants, without sufficient cause, discharged the plaintiff from their service before the expiration of the term, the *prima facie* measure of damages was the amount which she would have

received, had the contract been fulfilled; and that the burden was upon the defendants to show that the plaintiff did, or by reasonable dilgence could have received other employment in business of the same kind or similar to that mentioned in the contract. (7 Fed., pp. 646—7.)

In the case at bar, the defendant neither plead nor attempted to prove anything in mitigation of damages. The plaintiff, on the other hand, showed, that he had made all reasonable efforts, after his discharge, to secure employment, and had failed. Under this state of fact the measure of damage given by the jury was clearly the measure of the plaintiff's loss.

Incidentally, the same principles are announced by the Supreme Court of Colorado, in Saxonia Mining Co. vs. Cook. See 4 Pac., 1113, and authorities there cited.

III.

The third assignment raises no question, that this court will consider, under principles too well established to require citation of authorities.

In conclusion, we respectfully submit, that the judgment below should be affirmed with damages for delay. The case is one of peculiar hardship to the plaintiff. Employed for the full term of a year, to work at a point a thousand miles away from home, he is discharged without cause in the midst of the fishing season, when, owing to wellknown conditions in the fishing business, it is practically impossible to secure other employment for the current year. When sued, the defendant hardly attempts a defence, but seeks

all the delay possible. (See the comments of the trial court on page 29 of the record.) From a just and inevitable judgment, a Writ of Error is sued on Assignments of Error that seem wholly without merit.

Nelson vs. Flint, 166 U. S., 276.

Respectfully submitted,

MALONY & COBB,

Attorneys for Defendant in Error.

No. 983.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALASKA FISH AND LUMBER COMPANY,
Plaintiff in Error,

vs.

EDWARD A. CHASE,
Defendant in Error.

PETITION FOR REHEARING,

FILED ON BEHALF OF DEFENDANT IN ERROR.

MALONY & COBB,
E. S. PILLSBURY and
PILLSBURY, MADISON & SUTRO,
Attorneys for Defendant in Error.

ALFRED SUTRO,
Of Counsel.

Pernau Press.

IN THE

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No. 983.

PETITION FOR REHEARING,

FILED ON BEHALF OF DEFENDANT IN ERROR.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

This is a case in which the defendant in error recovered a judgment against the plaintiff in error for $1773, for damages for a wrongful discharge under a contract of employment. Your Honors, on the 1st day of March, 1904, filed your opinion reversing the judgment of the Court below, on the ground that the Court erred in instructing the jury that the damages, which the plaintiff was entitled

to recover, was the amount due under the contract from the date of the employment to the time of the rendition of the judgment, less the amount actually paid, without instructing the jury that it was the plaintiff's duty (if he was improperly discharged) to use prompt and reasonable diligence to procure other employment of a similar character, and thus reduce the damages. Your Honors said: "The plaintiff's duty if he was improperly dis- " charged was to use prompt and reasonable diligence to " procure other employment of a similar character, and " thus reduce the damages; and if he did not conform to " that duty, the damages should be mitigated to the ex- " tent of the compensation which he might have received " by proper effort in seeking employment."

In so deciding, we very respectfully submit, your Honors have overlooked the all-important and vital rule, that *the mitigation of the damages by securing other employment is matter of defense; that the burden of proving it rests upon the defendant; that the opportunity for such employment is not presumed; that the plaintiff was under no duty of proving that it did not exist; that as the defendant offered no such proof, there was no question upon that subject to go to the jury; that it would have been error for the Court to have submitted it to the jury, and that the plaintiff was entitled to recover the whole amount of the stipulated compensation as the damages attributable to the defendant's breach of contract.*

If we can, by this petition, convince your Honors that you have overlooked this rule, *which was not called to your attention,* then we most earnestly and respectfully ask that you grant us a rehearing.

The undisputed facts are that the plaintiff entered the employ of the defendant on March 1st, 1902, and continued therein until discharged, on the 24th day of June, 1902. He was employed under a written contract for one year, at the rate of $200 per month. He testified that he was discharged without cause, although he had performed his duties to the best of his ability; that, after his discharge, he tried to get employment of the same or a similar character as that from which he was discharged, but was not successful. The record then recites (*Tr.*, p. 52): "After " some evidence had been introduced on behalf of the de- " fendant, and the plaintiff having offered some in re- " buttal, and the cause having been submitted to the jury, " the Court then gave the following instructions to the " jury". *The defendant offered no evidence whatever to prove that the plaintiff could have secured other employment.*

In the absence of an affirmative showing by the defendant that the plaintiff could have secured other employment, had he made reasonable efforts in that behalf, we most respectfully submit that the amount of wages agreed to be paid was properly taken as the measure of damages, and that the Court did not err in excluding from its instructions to the jury the question whether or not the plaintiff might have lessened the amount of the damages by securing other employment similar to that from which he was discharged.

In justice to your Honors, in justice to the Judge of the Court below whose interpretation of the law, as embodied in his charge to the jury, your Honors are reversing,

and, finally, in justice to this defendant in error, we petition your Honors to briefly reconsider the supposed omission in the instructions of the Court, in the light of the very cases upon which you have based your opinion.

In *Saxonia Mining & Reduction Co. v. Cook,* 4 Pac. 1111, 1113, the first case cited by your Honors, the Court said:

> "The amount of the agreed wages may be taken as the measure of damages *prima facie,* or in the absence of any other showing. * * * But while the defendant in such case is entitled to mitigate the damage to the extent of what the plaintiff might have earned from other parties during the term, *the burden of establishing such mitigating fact is upon the defendant.*"

In *Park Bros. Co. v. Bushnell,* 60 Fed. 583, 591, 592, the Court of Appeals says that the trial court correctly charged the jury in conformity with *Howard v. Daly,* 61 N. Y. 362, and *Costigan v. Railroad Co.,* 2 Denio 609; those being the other two cases to which your Honors refer.

In *Howard v. Daly,* 61 N. Y. 362, the Court said:

> "*Prima facie,* the plaintiff is damaged to the extent of the amount stipulated to be paid. The burden of proof is on the defendant to show either that the plaintiff has found employment elsewhere, or that other similar employment has been offered and declined, or, at least, that such employment might have been found. *I do not think that the plaintiff is bound to show affirmatively, as a part of her case, that such employment was sought for and could not be found* (2 Greenl. on Evid., § 261, a; *Costigan v. M. & H. R. R. Co.,* 2 Den. 609.) *No such evidence having been offered by the defendant, the plaintiff should recover the whole amount of her stipulated compensation as the damages attributable to the defendant's breach of con-*

> *tract.* This, as has been seen, is the true measure of damages. (*Classman v. Lacoste,* 28 E. L. & Eq. 140; *Goodman v. Pocock,* 15 Ad. & El. 576; *Smith v. Thompson,* 8 C. B. 444; *Smith on Master & Servant,* 98)."

In *Costigan v. The Mohawk & Hudson R. R. Co.,* 2 Denio 609, the Court decided that, in a suit for a stipulated compensation, the defendant may show in diminution of damages that, after the plaintiff had been dismissed, he had engaged in other business, or that employment, of the same general nature, as that from which he had been dismissed, had been offered to him and been refused by him; *the opportunity to be so employed, however, will not be presumed, but must be affirmatively shown by the defendant on whom rests the burden of proof* (pp. 616, 617):

> "I think we cannot, as between these parties, presume that the plaintiff might have been so employed and that he refused; and therefore the report, in my judgment, should be set aside. If the defendants can prove that such employment was offered, it may reduce the amount otherwise recoverable; but if such proof shall not be given, the report, I think, should be for the salary at fifteen hundred dollars a year, and rent at one hundred and fifty dollars, and for a full year, deducting the amount which may have been paid towards the same."

After a most diligent and careful search of the authorities bearing upon this question, we have not found a single one which announces a doctrine, other than that for which we here contend. We respectfully ask your Honors to consider a few of the cases.

In *Schroeder v. California Yukon Trading Co.*, 95 Fed. 296, the District Court for the Northern District of California (De Haven, J.) said:

> "One who has been wrongfully dismissed from service is entitled *prima facie* to recover as damages therefor an amount equal to what he would have earned for the entire term of his employment, if he had been permitted to perform his contract; but the defendant may show for the purpose of reducing this sum, that the plaintiff earned and received wages in some other employment during the period of time covered by the contract, or that with reasonable diligence on his part he might have earned something by accepting from others work of the same general character as that which he was employed by the defendant to perform."

The Supreme Court of California, in *Rosenberger v. Pacific Coast Ry. Co.*, 111 Cal. 313, 318, said:

> "While it is the duty of an employee who has been wrongfully discharged to seek other employment, and thus diminish the damages sustained by him, he is not required, as a condition of recovery, to show that he has made such endeavor and failed. The burden is on the defendant to show that he could by diligence have obtained employment elsewhere. Whatever compensation may have been received in such employment is also to be shown by the defendant in mitigation of damages; otherwise the damages will be measured by the salary or wages agreed to be paid. (*Sutherland on Damages*, sec. 693; *Costigan v. Mohawk etc. R. R. Co.*, 2 Denio 609; 43 Am. Dec. 758; *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 285; *Utter v. Chapman*, 43 Cal. 279.)"

In *Barker v. Knickerbocker Life Ins. Co.*, 24 Wis. 630, 638, the Supreme Court of Wisconsin said:

> "*The instructions asked by the defendant, which*

sought to authorize the jury to reduce the plaintiff's damages if they should find in his favor, by the amount which he might have earned elsewhere, after his wrongful discharge, were properly refused. The rule in such cases is, that although the damages may be so reduced, yet the burden is on the defendant to show affirmatively that the plaintiff might have had employment and compensation elsewhere. *Here the defendant offered no such proof, and there was therefore no question upon that subject to submit to the jury.*''

In *Farrell v. School District etc.,* 56 N. W. 1053-4 (98 Mich. 43), it is said by the Supreme Court of Michigan:

''A plaintiff may rest his case upon proof of a contract of service, its breach, and damages, which are determined by the contract price of the services. The defense that he was engaged in other profitable employment, or might have had other similar employment, is an affirmative one and the burden of proof is upon the defendant. If an employer sees fit to discharge his employee without legal excuse, it is equally within his power to seek, and, if he find, to offer, other similar employment to such employee or to furnish evidence to the jury that such employment might, with reasonable effort, have been obtained. When he has been guilty of the wrong the law casts the burden upon him to show that the employee has not, or need not have, suffered damage.''

So in *Odoneal v. Henry,* 12 So. 154, the Supreme Court of Mississippi says:

''The appellants have no reason to complain of the first instruction given for appellee. Primarily, it was not incumbent upon the appellee to satisfy the jury that he had made diligent efforts to obtain employment, and had failed. If, after his discharge, he had other employment, or if he could have had, and failed or neglected to secure it, the appellant should

have made the proper proofs. Such proof is defensive in its character, and goes to reduce damages assessable against the discharging employer. The burden of proof on this point was on the appellants; and if there was no evidence, as counsel for appellants assert, showing when, if ever, appellee secured other employment, the appellee must not be held to have failed in making out his case. He was only to be required to meet any state of case made by appellant's evidence, which showed that he had been in other employment during the period of contract of service or that he might have been."

The Supreme Court of Arkansas, in *Van Winkle v. Satterfield*, 58 Ark. 617, 623 (25 S. W. 1113; 23 L. R. A. 853) says:

"The burden of proof is on the employer to show that the servant might have obtained similar employment, for the failure of the servant to obtain other employment does not affect the right of action but only goes in reduction of damages and if nothing else is shown 'the servant is entitled to recover the contract price, upon proving the employer's violation of the contract, and his own willingness to perform'. The fact that the servant might have obtained new employment does not constitute a defense. It is one of the facts to be considered in estimating the servant's loss. *Howard v. Daly,* 61 N. Y. 362; 19 Am. Rep. 285; *Gillis v. Space,* 63 Barb. 177; *Costigan v. Mohawk & H. R. R. Co.,* 2 Denio 659; 43 Am. Dec. 758; *Sutherland v. Wyer,* 67 Me. 64; *2 Sutherland Damages,* §693; *Wood, Mast. & S.,* p. 245."

To the same effect are:

Leatherberry v. Odell, 7 Fed. 641;

Ansley v. Jordan, 61 Ga. 482;

Holloway v. Talbot, 70 Ala. 389, 392;

Strauss v. Meertief, 64 Ala. 299, 309; 38 Am. Rep. 8;
Horn v. Western Land Assn., 22 Minn. 233, 237;
Emery v. Steckel, 17 Atl. 601, 602;
Hinchcliffe v. Koontz, 23 N. E. 271, 272.

In your opinion your Honors say: "The jury might "have been satisfied from the plaintiff's own testimony, "from his manner of testifying, for instance, that he "did not make any reasonable or *bona fide* effort to ob- "tain other employment, and yet by the instructions of "the Court they were precluded from giving effect to "such a conclusion." But, your Honors, *the plaintiff was not, for the purposes of his case, required to prove that he made any reasonable, or bona fide, or any, effort to obtain other employment; that he could have done so was completely and absolutely a matter of defense for the defendant.* His testimony upon the subject, in the absence of any evidence thereon by the defendant, was entirely irrelevant and immaterial and, therefore, of no consequence whether submitted to, or withdrawn from, consideration of the jury.

As said by the Supreme Court of Indiana in the case of *Hamilton v. Love,* 43 N. E. 873, at page 874:

> "Nor is it true that the discharged servant must allege that since his discharge he has earned nothing from sources other than that of his employment under the broken contract. It is true that any sum earned by him, or which, by reasonable diligence, might have been earned by him, after his discharge, is to be considered against the value of his wages under the contract; but this conclusion does not require that he shall, in the first instance, negative the fact of his having earned nothing, and having been unable to

> get employment. The most that can be required of him in the first instance, is to plead and establish a *prima facie* case; and then, in response to this *prima facie* case, the defendant must establish the fact that the plaintiff has, or could have, earned wages after the discharge."

We earnestly say, therefore, that the amount of the wages agreed to be paid was *prima facie* the measure of the damages which the plaintiff suffered; that the complaint, which was drawn after a careful examination of the authorities, is based upon a proper theory; that it is not for constructive services, but for those damages which *prima facie* flow from the facts alleged; that it was incumbent upon the defendant, if it had so desired and could have done so, to have proved in mitigation of these damages that the plaintiff could, with reasonable diligence, have secured other employment; that in the absence of any such proof it would have been error for the trial court to have instructed the jury otherwise than it did.

Without calling to the attention of your Honors, further than in passing, that additional and controlling reasons exist for granting a rehearing, because *no exception to the instructions was taken before the jury retired,* contrary to the rule declared by this Court in *Yates v. U. S.,* 90 Fed. 57; and in *West. Union Tel. Co. v. Baker,* 85 Fed. 690 (see also *Sutherland v. Round et al.,* 57 Fed. 467; *Emanuel v. Gates,* 53 Fed. 773, 775, 776); because *the exception to the instructions did not suggest, or point out, the defect complained of, so as to bring it distinctly to the Court's attention and afford an opportunity to remedy an*

omission, if any existed, but was taken to the instructions as a whole, contrary to the established practice (see *Cass County v. Gibson,* 107 Fed. 363, 367; *Eastern Oregon Land Co. v. Cole,* 92 Fed. 949; *Price v. Pankhurst,* 53 Fed. 312; *New England etc. Co. v. Catholicon Co.,* 79 Fed. 294, 296; *Texas & P. Ry. Co. v. Volk,* 151 U. S. 73, 78), we very respectfully petition your Honors, for the reasons herein stated, to grant a rehearing in this case.

MALONY & COBB,
E. S. PILLSBURY and
PILLSBURY, MADISON & SUTRO,
Attorneys for Defendant in Error.

ALFRED SUTRO,
Of Counsel.

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

ALFRED SUTRO,
Of Counsel for Defendant in Error.

Dated: San Francisco, April 15th, 1904.

No. 981

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

PAAUHAU SUGAR PLANTATION COMPANY (A CORPORATION),

Appellant,

vs.

SAMUEL PALAPALA,

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District Court for the District of Hawaii.

THE FILMER BROS. CO. PRINT, 424 SANSOME ST., S. F.

INDEX.

In the District of the United States, in and for the District of Hawaii.

IN ADMIRALTY.

In the Matter of the Application of SAMUEL PALAPALA, For Leave to Prosecute a Suit in Forma Pauperis.

Affidavit of Poverty of Samuel Palapala.

United States of America,
District of Hawaii,
Island of Oahu,
City of Honolulu. } ss.

Samuel Palapala, being first duly sworn, deposes and says: I am a citizen of the United States, entitled to commence a suit or action in a court of the United States. I respectfully state to said Court, under oath, that, because of my poverty, I am unable to pay the costs of that certain libel in personam which I am about to commence against Paauhau Sugar Plantation Company, in said court, or to give security for said costs; and I believe that I am entitled to the redress which I seek in and by said libel.

The nature of my cause of action in said libel is that, by reason of the carelessness and the negligence of the defendant therein named, I have suffered and sustained great and serious personal injuries, incapacitating me

from the pursuit of my occupation as mariner; and that, in said libel, I claim redress therefor by way of wages and damages.

Wherefore, I respectfully pray for an order of said Court authorizing and permitting me to commence and prosecute said libel in said court without prepayment of costs, and without giving security for said costs.

his
SAMUEL X PALAPALA.
mark

Witness to said mark:
ANTONE MANUEL.

Subscribed and sworn to before me, this 11th day of April, A. D. 1903.

[Seal] ANTONE MANUEL,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Order to Proceed in Forma Pauperis.

Upon reading and filing the foregoing affidavit, and it appearing to the Court that said affidavit is in conformity with the provisions of the act of July 20th, 1892 (27 Stats. L., 252):

It is hereby ordered that the prayer of said affidavit be, and the same is hereby, granted; and said affiant is hereby authorized and permitted to commence and prosecute, in said court, the libel in said affidavit mentioned, without prepayment of costs, and without giving security for said costs.

Dated, Honolulu, Hawaii, April 11, A. D. 1903.

MORRIS M. ESTEE,
Judge of said Court.

[Endorsed]: Title of Court and Cause. Affidavit and Order. Filed April 11th, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States, in and for the District of Hawaii.

IN ADMIRALTY.

SAMUEL PALAPALA, Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY (a Corporation), Defendant.
} In Personam.

Libel.

To the Honorable MORRIS M. ESTEE, Judge of the District Court of the United States, in and for the District of Hawaii:

Libel of Samuel Palapala of said District, mariner, late seaman on board the American steamship "Helene," whereof D. F. Nicholson, during all the times herein mentioned, was, and still is Master, against Paauhau Sugar Plantation Company, a corporation, in a cause of damages, civil and maritime, alleges as follows:

First.—This libelant respectfully shows that he is about 25 years of age, and an unmarried man; that he is a native of said Territory and District of Hawaii, and has resided therein all his life; that he is a mariner by occupation, and that at the time of the reception of the injuries hereinafter referred to, and for some time prior thereto, he continued to be, and was, a seaman on the aforesaid steamship "Helene"; that during all the times herein mentioned he had no other calling, occupation or profession save and except that of mariner, or any other source of income save and except the wages derived from his said occupation of mariner; that during all the times herein mentioned he was, and still is, without independant fortune, and entirely dependent for his support and maintenance, and for the support and maintenance of his father, upon his wages earned in said profession of mariner; and in this behalf, this libelant further shows that his wages and earnings as such seaman aforesaid on the aforesaid steamship, amounted to and were the sum of seven and one-half ($7.50) dollars for each and every week. This libelant further shows that for a long time prior to, and at, the reception of the injuries hereinafter referred to, he was in perfect health and well, strong and hearty, and enjoyed the full and free use of his limbs.

Second.—This libelant further shows that said Paauhau Sugar Plantation Company, during all the times herein mentioned, was, and still is, a corporation duly formed, organized and existing uder and pursuant to the laws of the State of California, and acting and doing business within said Territory and District of Hawaii, and within

the jurisdiction of said court, under and pursuant to the laws of the Territory of Hawaii; and in this behalf, this libelant shows that said Sugar Plantation Company, during all the times herein mentioned, was, and still is, operating a sugar plantation and wharf as a part thereof, at Paauhau, on the Island of Hawaii, in said Territory and District of Hawaii; and in this behalf, this libelant further shows that the sugar produced by said Paauhau Sugar Plantation Company, during all the times herein mentioned, and at the time of the reception of the injuries hereinafter referred to, was shipped from said wharf, and that said sugar was discharged from said wharf, by said Paauhau Sugar Plantation Company, for transportation elsewhere, into vessels alongside said wharf, and afloat upon the navigable waters of the port or harbor of Paauhau, on said Island of Hawaii, in said Territory.

Third.—This libellant shows that the injuries hereinabove and hereinafter referred to were caused by, and received in consequence of, a marine tort to said libelant occurring within the admiralty jurisdiction of said court; and in this behalf, this libelant shows that the injuries and damages caused by said marine tort to this libelant occurred wholly and entirely to him upon a vessel afloat upon navigable waters, while the aforesaid vessel was alongside of, but not made fast to, said wharf; that at the time of the occurrence and reception of said injuries and damage, said vessel was wholly and entirely disconnected from any shore or any wharf; and that at the time of the occurrance and reception of said injuries and dam-

age, said vessel was afloat upon the navigable waters of the port or harbor of Paauhau, on said Island of Hawaii, in said Territory.

Fourth.—This libelant further shows that on March 19th, 1903, within the jurisdiction of said court, to wit; in the harbor and port of Paauhau, in the Island of Hawaii, in the Territory and District of Hawaii, by, through and in direct and immediate consequence of the carelessness and negligence of said defendant, and without any fault, carelessness or negligence upon the part of this libelant, this libelant suffered and sustained the great and serious injury and damage hereinafter more particularly set forth; and in this behalf, this libelant now avers and sets forth the facts constituting said carelessness and negligence of said defendant, as follows, to wit:

This libelant shows that the facts hereinabove in the prior paragraphs of this libel existed as in said paragraphs alleged at the time and place of said carelessness and negligence and said injury and damage, and said libelant now incorporates into this paragraph and makes a part hereof, said prior paragraphs of this libel. On the afternoon of said March 19th, 1903, said steam vessel "Helene" was anchored in the port and harbor of Paauhau aforesaid, some distance off and away from said wharf, the exact distance this libelant is not able to state, to receive from said Sugar Plantation Company from said wharf, certain sugar to be transported elsewhere; and in this behalf, this libelant shows that said steam vessel was not made fast to, or connected in any way with, said

wharf. Said steam vessel "Helene," at the time and place herein referred to, had three large boats, and one smaller one, which were intended and used to transport sugar from the shore or wharf to the vessel. The master of said steam vessel ordered this libelant to go with others from said steam vessel to said wharf, in one of the larger of these boats and to procure from said wharf a cargo of sugar, transport the same to said steam vessel, and then discharge the same into said steam vessel. This libelant shows that he obeyed the orders of said master and went in and with said boat and its crew, from said steam vessel to said wharf; and in this behalf, this libelant further shows that said boat was not at any time made fast to or connected with said wharf, but was kept in position by the use of the oars; and this libelant further shows that during all the times herein mentioned, the surface of said wharf was considerably elevated above the surface of said boat, the exact distance this libelant is not able to state.

The process by which said sugar was then and there transferred from said wharf to said boat was as follows: on said wharf there was a derrick so constructed as to be capable of being swung out over the edge of said wharf so that sugar hoisted thereby would be suspended over the water; attached to the upper end of this derrick was a block, and at its heel there was another block, and through these two blocks a wire fall was rove; at one end of this fall was attached a hook used to hoist the sling loads of sugar, while the other end of said fall led to the steam winch which was used to hoist the sugar to the end of the derrick, and thence to lower it into the boat. This

libelant shows that these appliances for transferring sugar were the appliances of, and operated by, said Paauhau Sugar Plantation Company only; that this libelant was not, at said time and place, or at any time or place, employed in any capacity whatever by said Sugar Plantation Company; and that, at said time and place, this libelant had nothing whatever to do, in any degree or capacity whatever, with said operations of transferring said sugar from said wharf into said boat. And in this behalf, this libelant shows that the machinery, appliances and gear by and through which said sugar was then and there transferred from said wharf to said boat, were then and there upon the wharf of said Sugar Plantation Company; that none of said machinery, appliances or gear, was made fast to or connected with said boat in any way; and that the persons who operated and managed said machinery, appliances and gear, were all employees of said Paauhau Sugar Plantation Company, and not members of the crew of said boat, or employees of said steam vessel "Helene." When a sling load of sugar was hoisted to the end of said derrick, said derrick was then trimmed or swung out so that such sling load of sugar would be over the water; it then became the duty of the employees of said Sugar Plantation Company who was in charge of said steam winch, to lower said sling load of sugar part way down, and then hold it to await a signal from the crew in the boat; said signal would notify said winchman when to let said sling load of sugar descend into said boat; said winchman was not to drop said sling load of sugar into said boat until he received said signal;

and in this behalf, this libelant shows that, according to the established process of transferring sugar from said wharf to said boat, if said winchman should drop said sling load of sugar into said boat without or before his reception of said signal, he would be violating his duty in the premises. Upon the proper giving and reception of said signal, but not otherwise, it was the duty of said winchman to drop said sugar into said boat.

On said March 19th, 1903, at the time and place of the reception of the injuries and damage by this libelant hereinafter referred to, a sling load of sugar was hoisted to the end of said derrick, and said derrick was so trimmed that said sling load of sugar was suspended over the water and partly over said boat; the crew of said boat were then and there endeavoring so to maneuver said boat as to place said boat in proper position to receive said sling load of sugar; while this was being done by said crew, but before said crew was ready to receive said sugar, and before any signal of any kind had been given from said boat to said winchman, and without any signal from said boat to said winchman, said winchman let go said sling load of sugar, whereupon it descended with very great rapidity into said boat; and in this behalf, this libelant shows that said sling load of sugar then and there contained ten (10) bags of sugar of one hundred and twenty-five pounds each. This libelant further shows that he endeavored to avoid said descending sling load of sugar, but the transaction occurred so quickly that he was unable to do so, and shows that said sling load of sugar struck him, this libelant, and knocked him down,

and made him insensible, and severely bruised him, and broke his collar bone. And in this behalf, this libelant shows that said injuries were then and there immediately, directly and approximately caused by the carelessness and negligence of said defendant; and in particular by the careless and negligent act of said winchman in letting go of said sling load of sugar before said crew in said boat was ready to receive the same, and before any signal of any kind had been given from said boat to said winchman, and without any signal from said boat to said winchman; and in particular by the careless and negligent manner and method in which the aforesaid machinery, appliances and gear were then and there not only set in motion, but also operated by said defendant, as hereinabove alleged; and in this behalf, this libelant further shows that by and through said carelessness and negligence of said defendant, said machinery, appliances and gear were so carelessly and negligently set in motion and operated by said defendant, that said sling load of sugar was permitted and allowed by said carelessness and negligence of said defendant, to descend upon and injure this libelant as hereinabove alleged.

Fifth.—This libelant further shows that by reason of the premises, and by reason of said injuries, he became and was, and still is, sick and sore and enfeebled and has suffered, and still suffers, great bodily pain and anguish of mind, and was, and still is, wholly incapacitated from attending to his said business and employment, and was, and still is, and in the future will be, deprived of divers great gains, profits and advantages which he ought and

otherwise would have derived and acquired; and in this behalf, this libelant further shows that by reason of said injuries he suffered great and intense mental suffering arising from the fear that he should become unable to earn his livelihood in his said profession. Libelant further shows that said steam vessel "Helene" arrived in the city of Honolulu in said District on Tuesday, March 24th, 1903, and that, thereupon, on said March 24th, 1903, this libelant entered the Queen's Hospital in said city of Honolulu, and that this libelant is still an inmate of said hospital where he is still under treatment for said injuries. Libelant further shows that ever since said March 19th, 1903, he has not earned any wages or other pay, and has been unable to earn anything, and all his time since March 19th, 1903, has been lost; and libelant further shows that ever since said March 19th, 1903, his earning capacity has been totally destroyed, and is now so destroyed, and this libelant does not know, and is not able to state, when, if at all, his former earning capacity will be restored. Whereby, and by reason of all the premises, said libelant has suffered and sustained damages in the sum and amount of fifteen thousand ($15,000) dollars, together with the sum and amount of wages lost to this libelant by reason of said injuries.

Sixth.—That said injuries and damage received and sustained by said libelant, as aforesaid, were occasioned, caused and brought about wholly by reason of the carelessness and negligence of said defendant, and without any fault, want or care or negligence on the part of said

libelant; and that all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court.

Wherefore said libelant prays that process in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue herein against the said Paauhau Sugar Plantation Company, said corporation; and that it be required to answer upon oath this libel and all and singular the matters aforesaid; and that this Honorable Court will be pleased to decree the payment of the damages aforesaid, together with the sum and amount of wages lost to this libelant by reason of said injury, and together with the costs and disbursements herein; and that this libelant may have such other and further relief as in law and justice he may be entitled to receive.

his
SAMUEL X PALAPALA,
mark
Libelant.

Witness to said mark:

ANTONE MANUEL.

J. J. DUNN,
Proctor for said Libelant.

United States of America,
District of Hawaii. } ss.

Samuel Palapala, the libelant named in the foregoing libel, being first duly sworn, deposes and says that he is the libelant named in the foregoing libel, and that he has heard read said libel; that he knows the contents of said libel; that said libel is true as to all matters therein stated as of his own knowledge; and that as to the matters therein stated upon information and belief, he believes it to be true.

his
SAMUEL X PALAPALA.
mark

Witness to said mark:

ANTONE MANUEL.

Subscribed and sworn to before me this 11th day of April, A. D., 1903.

[Seal] ANTONE MANUEL.

Notary Public, First Circuit, Territory of Hawaii.

[Endorsed]: Title of Court and Cause. Libel. Filed April 11th 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States, in and for the District of Hawaii.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY (a Corporation),
Defendant.

Order Summoning Defendant.

Upon reading and filing the verified libel in the above-entitled matter:

It is hereby ordered that process issue in the above-entitled cause as prayed for in the libel; and,

It is hereby further ordered that the aforesaid defendant be duly summoned to appear and answer said libel on oath, on the 17th day of April, A. D. 1903, at the opening of said court on said day, or as soon thereafter as counsel can be heard.

Dated, Honolulu, Hawaii, April 11th, A. D. 1903.

MORRIS M. ESTEE.
Judge of said Court.

[Endorsed]: Title of Court and Cause. Order. Filed April 11, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

Minutes of Court.

From Minutes U. S. District Court, Page 284, Saturday, April 11th, 1903.

[Title Court and Cause.]

Comes now J. J. Dunn, Esq., proctor for said libelant, and presents an affidavit of said Samuel Palapala; and it appearing to the Court that said affidavit is in conformity with the provisions of the act of July 20th, 1892, (27 Stats. L. 252), it is hereby ordered that the prayer of said affidavit be, and the same is hereby granted; and said affiant is hereby authorized and permitted to commence and prosecute, in said court, the libel in said affidavit mentioned, without prepayment of costs, and without giving security for said costs.

And afterwards and upon reading the libel herein the Court made the following order, to wit:

It is hereby ordered that process issue in the above-entitled cause as prayed for in said libel; and,

It is hereby further ordered that the aforesaid defendant be duly summoned to appear and answer said libel on oath, on the 17th day of April, A. D. 1903, at the opening of said court on said day, or as soon thereafter as counsel can be heard.

UNITED STATES OF AMERICA.

In the District Court of the United States for the Territory of Hawaii.

Citation.

The President of the United States of America, to the Marshal of the United States of America, for the Territory of Hawaii, Greeting:

Whereas, a libel has been filed in the District Court of the United States for the Territory of Hawaii, on the 11th day of April, A. D. 1903, by Samuel Palapala vs. Paauhau Sugar Plantation, a corporation, in a certain action for damages, civil and maritime, to recover the sum of $15,000 (as by said libel, reference being hereby made thereto, will more fully and at large appear), therein alleged to be due the said libelant, Samuel Palapala, and praying that a citation may issue against the said respondent, pursuant to the rules and practice of this court: Now, therefore, we do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said respondent if it shall be found in your District, that it be and appear before the said District Court, on Friday, the 17th day of April, A. D. 1903, at the courtroom in the city of Honolulu, then and there to answer the said libel, and to make its allegations in that behalf; and have you then and there this writ, with your return thereon.

Witness the Honorable Morris M. Estee, Judge of

said Court, at the city of Honolulu, in the Territory of Hawaii, this 11th day of April, A. D. 1903, and of the independence of the United States the one hundred and twenty-seventh.

[Seal] W. B. MALING,
Clerk.
By Frank L. Hatch,
Deputy Clerk.

J. J. DUNN,
Proctor.

MARSHAL'S RETURN.

I have served this writ personally by copy on W. M. Giffard, 2nd vice-president of Wm. G. Irwin & Co., who are the Agents for Paauhau Sugar Plantation, and also left with him a copy of the libel, this 13th day of April, A. D. 1903.

E. R. HENDRY.
United States Marshal.

[Endorsed]: Title of Court and Cause. Citation issued April 11th, 1903. J. J. Dunn, Proctor for Libelant. Filed April 13, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States of America, in for the Territory of Hawaii.

IN ADMIRALTY.—LIBEL IN PERSONAM.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY (a Corporation),
Defendant.

Appearance of Proctors for Defendant.

Sir, You will please to enter our appearance as proctors for the Paauhau Sugar Plantation Company, defendant in the above-entitled cause.

April 16th, 1903.

HOLMES & STANLEY,
Proctors.

To W. B. Maling, Esq., Clerk.

[Endorsed]: Title of Court and Cause. Appearance of Holmes & Stanley as Proctors for Defendant. Filed April 17, 1903. W. B. Maling, Clerk.

In the District Court of the United States of America, in for the Territory of Hawaii.

IN ADMIRALTY.—LIBEL IN PERSONAM.

SAMUUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY (a Corporation),
Defendant.

Stipulation Extending Time to Answer.

It is hereby stipulated by and between J. J. Dunn, Esq., proctor for the libelant, and Messrs. Holmes & Stanley, proctors for the defendant, that the time within which the defendant may except to the libel herein or make answer thereto may be extended from Friday, the 17th day of April, 1903, to Friday, the 24th day of April, 1903.

April 16th, 1903.

J. J. DUNN,
Proctor for Libelant.

HOLMES & STANLEY,
Proctors for Defendant.

[Endorsed]: Title of Court and Cause. Stipulation. Filed April 16, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

No. 32.

UNITED STATES OF AMERICA.

District Court of the United States for the Territory of Hawaii.

Cost Bond.

Whereas, a libel was filed in this court, on the 11th day of April, in the year of our Lord one thousand nine hundred and three, by Samuel Palapala against the Paauhau Sugar Plantation Company, a corporation, for reasons and causes in the said libel mentioned, and the said Paauhau Sugar Plantation Company and W. M. Giffard and H. M. Whitney, Jr., its sureties, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the said Paauhau Sugar Plantation Company or its sureties, execution may issue against their goods, chattels and lands for the sum of two hundred dollars.

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the undersigned shall be, and each of them is, bound in the sum of two hundred dollars conditioned the Paauhau Sugar

Plantation Company, above named shall pay all costs and charges that may be awarded against them in any decree by this court, or, in case of appeal, by the appellate court.

PAAUHAU SUGAR PLANTATION CO.
By Its Agents,
WM. G. IRWIN & CO., LD.,
By Its 2d Vice-Pres.,
W. M. GIFFARD.
W. M. GIFFARD,
H. M. WHITNEY, JR.

Taken and acknowledged this 17th day of April, 1903, before me.

[Seal] W. B. MALING,
Clerk United States District Court, Territory of Hawaii.

Territory of Hawaii —ss.

W. M. Giffard and H. M. Whitney, Jr., parties to the above stipulation, being duly sworn, do depose and say, each for himself, that he is a resident freeholder in said Territory; that he is worth the sum of five hundred dollars, over and above all his debts and liabilities, and that his property is situate in said Territory and subject to execution.

W. M. GIFFARD.
H. M. WHITNEY, JR.

Sworn to this 17th day of April, 1903, before me,

[Seal] W. B. MALING,

Clerk, United States District Court, Territory of Hawaii.

Filed this 17th day of April, 1903. W. B. Maling, Clerk.

From Minutes U. S. District Court, Page 301, Friday, April 17, 1903.

[Title of Court and Cause.]

Order Extending Time to File Answer.

This being the return day, the Marshal made due proclamation according to law, whereupon both parties stipulating thereto, it was ordered that the libelee have until Friday, April 24, 1903, within which time to file his answer or exceptions to the libel herein.

In the District Court of the United States of America, in and for the District of Hawaii.

IN ADMIRALTY.—LIBEL IN PERSONAM.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY (a Corporation),
Defendant.
No. 32.

Stipulation for, and Order Allowing Amendment of Libel.

In the above-entitled cause, it is hereby stipulated and agreed that the libel therein be, and the same is hereby, amended as follows, to wit:

1.

After the word "man" on line 21 of page 7 of said libel, and before the word "let" on the same line and page, insert the following words: "suddenly and without any warning or other notice to said crew in said boat, and contrary to the aforesaid established method of transferring said sugar."

Dated Honolulu, Hawaii, April 20th, 1903.

HOLMES & STANLEY,
Proctors for said Defendant.

J. J. DUNN,
Proctor for said Libelant.

Let the foregoing amendment be, and it is hereby, allowed and ordered filed, this April 20th, 1903.

MORRIS M. ESTEE,
Judge of said Court.

[Endorsed]: Title of Court and Cause. Stipulation. Filed April 21, 1903. W. B. Maling, Clerk.

In the District Court of the United States in and for the Territory of Hawaii.

IN ADMIRALTY.—LIBEL IN PERSONAM.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY (a Corporation),
Defendant.
No. 32.

Amendment to Libel.

Filed Pursuant to Consent of Parties and Order of Court.

In the above-entitled cause, by consent and stipulation of Paauhau Sugar Plantation Company, a corporation, the above-named defendant, and an order of said court, heretofore duly given and made in said action, the libel of said libelant is hereby amended in the particular following, and said amendment is hereby made, verified and filed in and to said libel:

After the word "man" on line 21 of page 7 of said libel, and before the word "let" on the same line and

page, insert the following words: "suddenly, and without any warning or other notice to said crew in said boat, and contrary to the aforesaid established method of transferring said sugar."

Dated, Honolulu, Hawaii, April 21st, 1903.

his
SAMUEL X PALAPALA
mark

Witness to said mark:

ANTONE MANUEL.

J. J. DUNN,
Proctor for Libelant.

United States of America,
District of Hawaii. } ss.

Samuel Palapala, being first duly sworn, deposes and says that he is the libelant in the above-entitled action, and that he has heard read the foregoing amendment to the libel in said action, and that he knows the contents thereof; and that the same is true of his own knowledge except as to the matters therein stated on information or belief, and that as to said matters he believes it to be true.

his
SAMUEL X PALAPALA.
mark

Witness to said mark:

ANTONE MANUEL.

Subscribed and sworn to before me this 21st day of April, A. D. 1903.

[Seal] ANTONE MANUEL.

Notary Public, First Judicial Circuit, Territory of Hawaii.

Due service of the above and foregoing amendment, and receipt of a copy thereof, are hereby admitted this 21st day of April, A. D. 1903.

HOLMES & STANLEY,
Proctors for Defendant.

[Endorsed]: Title of Court and Cause. Amendment to Libel. Filed April 21, 1903. W. B. Maling, Clerk.

In the District Court of the United States of America, in and for the Territory of Hawaii.

LIBEL IN ADMIRALTY.

SAMUEL PALAPALA,
vs.
PAAUHAU SUGAR PLANTATION COMPANY,

Stipulation Extending Time to File Answer.

It is hereby stipulated and agreed by and between J. J. Dunn, Esq., proctor for the libelant, and Messrs. Holmes & Stanley, proctors for the respondent, that the time within which the respondent may except to the libel

herein filed or make answer thereto be further extended from Friday the 24th inst., to Tuesday, the 28th inst., on condition that no further time be asked for.

April 23, 1903.

J. J. DUNN,
Proctor for Libelant.

HOLMES & STANLEY,
Proctors for Respondent.

[Endorsed]: Title of Court and Cause. Stipulation. Filed April 23, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States, in and for the Territory of Hawaii.

IN ADMIRALTY.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY (a Corporation),
Defendant.

Answer of Defendant.

To the Honorable MORRIS M. ESTEE, Judge of the District Court of the United States in and for the District and Territory of Hawaii.

In answer to the libel of the above-named libelant the defendant alleges and propounds as follows:

1. Answering the allegations of the first paragraph of said libel defendant says that having no knowledge or information sufficient to form a belief it neither admits nor denies the said allegation, but leaves libelant to his proof thereof.

2. Answering the allegations of the second paragraph of said libel, defendant admits the same.

3. Answering the allegations of the third paragraph of the said libel, defendant denies that the libelant's injuries referred to in the said libel were caused by or received by him in consequence of a marine tort to said libelant.

Defendant admits all the allegations of said paragraph not expressly denied.

4. Answering the allegations of the fourth paragraph of the said libel, defendant denies that the injury claimed to have been sustained by the libelant was occasioned, occured or resulted from, by, through or in consequence of the fault, carelessness or negligence of the defendant or at all, or through any fault of the defendant, and denies that said injury was suffered and sustained by the libelant without any fault, carelessness or negligence upon the part of the libelant. Defendant admits that upon the afternoon of the 19th day of March, 1903, the steam vessel "Helene" was anchored in the port and harbor of Paauhau for the purposes in the said libel mentioned; that the said steam vessel was not

made fast or connected with the wharf at Paauhau, and that at said time and place she had certain boats (the number of which is unknown to defendant), and that such boats were intended and used to transport sugar from the short or wharf to said steam vessel; that the libelant went with others from the said steam vessel to said wharf in one of the larger of said boats to procure from said wharf a cargo of sugar, transport the same to said steam vessel, and then discharge the same into said steam vessel, but for want of knowledge or information sufficient to form a belief, this defendant neither admits nor denies that libelant did so in response to an order from the master of said steam vessel, and therefore leaves the libelant to his proof thereof.

Defendant admits that said boat in which the libelant was as aforesaid was not made fast to or connected with said wharf, but was kept in position by the use of the oars, and that the surface of said wharf was considerably elevated above the surface of said boat. Defendant admits that the appliances by which said sugar was then and there transferred from said wharf to said boat are correctly described in the said paragraph; that such appliances belonged to and were operated by the defendant only; that said appliances were then and there upon the said wharf; that none of said machinery, appliances or gear was made fast to or connected with said boat in any way and that the persons who operated and managed said machinery, appliances and gear were all employees of the defendant and not members of the crew of said boat or employees of said

steam vessel "Helene"; and that the libelant was not at the times and places mentioned in the said libel or at any other time or place employed in any capacity whatever by it.

Defendant admits that when a sling load of sugar was hoisted to the end of the derrick said derrick was then trimmed or swung out so that such sling load of sugar would be over the water, and that it then became the duty of the employee of the defendant who was in charge of the steam winch to lower said sling load of sugar part way down, and then hold it to await a signal when to let it descend into said boat and that said winchman was not to drop said sling of sugar into said boat until he received such signal, but defendant denies that according to the established process of transferring sugar from said wharf to said boat such signal could only be given to said winchman by the crew in said boat, but on the contrary avers that acccording to the established process of transferring sugar from said wharf to said boat, such signal could be given to the said winchman either by the crew in the said boat or by any person in the employment of the said steam vessel who might be charged with the duty of overseeing and superintending the work of transferring said sugar and of loading said suger into said boat, and that the said winchman would be in observance of his duty in acting upon such signal.

Defendant admits that on the said 19th day of March, 1903, at the time and place when and where the libelant claimed to have received the injuries in the said libel

described a sling load of sugar was hoisted to the end of said derrick and said derrick was so trimmed that said sling load of sugar was suspended over the water and partly over said boat, and in a position that had been ordered by the crew of said boat; and that the crew of said boat then and there were endeavoring to maneuver said boat so as to place the same in proper position to receive said sling load, but defendant denies that while the crew of said boat were so maneuvering the same or before said crew was ready to receive said sling load, or before and without any signal had been given from said boat to said winchman, the said winchman let go said sling load either suddenly or without any warning, or at all, and that the said sling load of sugar descended into said boat with very great rapidity or at all, but, on the contrary, defendant avers the truth to be that after the said derrick was so trimmed that said sling load of sugar was suspened over the water, the said winchman received a signal from the crew in said boat to lower the said sling load part way down; that the said winchman in response to said signal lowered the said sling load part way down to a position indicated by the crew in said boat and there held it awaiting a signal to lower the said sling load into the said boat; that said winchman did not thereafter lower the said sling load further and before he received any signal so to do the said boat was suddenly lifted on a big wave up and towards the said sling load, and the libelant was then and there struck by the said sling load and knocked down, whereby he sustained certain injuries of the extent of which this defendant has no knowledge.

Defendant denies that at any of the times mentioned in the said libel, either it or its employee, the said winchman, was guilty of any carelessness or negligence, and that its machinery, appliances or gear were set in motion or operated in a careless or negligent manner, but, on the contrary, the defendant alleges that the defendant and its employee, the said winchman, at all the times mentioned in the said libel used and exerised proper care and skill, and that its machinery, gear and appliances were properly, prudently and carefully operated and used by said defendant.

All the other allegations in the said paragraph not herein expressly admitted are denied.

5. Answering the allegations of the fifth paragraph of said libel, defendant says that having no knowledge or information sufficient to form a belief, it neither admits nor denies the said allegations, but leaves libelant to his strict proof thereof.

6. Answering the allegations of the sixth paragraph of said libel, defendant admits that the said alleged facts and circumstances set forth in said libel and referred to in said paragraph are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. Defendant denies all of the other allegations in the said paragraph contained.

Wherefore defendant asks that it may be dismissed with its costs in this behalf incurred.

April 28th, 1903.

PAAUHAU SUGAR PLANTATION COMPANY.

By Its Attorneys,

HOLMES & STANLEY.

HOLMES & STANLEY,

Proctors for Defendant.

Territory of Hawaii, }
Island of Oahu. } ss.

W. L. Stanley, being duly sworn, upon oath deposes and says: that he is a member of the firm of Holmes & Stanley, proctors for the defendant, Paauhau Sugar Plantation Company; that the said Paauhau Sugar Plantation Company is a foreign corporation; that none of the officers thereof are within the Territory of Hawaii, and therefore he makes this verification on its behalf; that he acquired knowledge of the matters and things stated in said answer from one Manuel Enos, an employee of the said corporation, and the winchman referred to in said answer, and that the matters and things stated in this, the answer of the Paauhau Sugar Plantation Company are true to the best of deponent's knowledge and belief.

W. L. STANLEY.

Subscribed and sworn to before me this 28th day of April, A. D. 1903.

[Seal] FRANK L. HATCH,

Deputy Clerk, United States District Court, Territory of Hawaii.

[Endorsed]: Title of Court and Cause. Answer of Defendant. Filed April 28th, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

From Minutes U. S. District Court, page 338, Tuesday, May 5, 1903.

[Title of Court and Cause.]

Order Setting Time for Trial.

Upon motion of proctor for the libelant herein, and by consent of proctor for the said libelee, the Court ordered that the trial of this case be set for Thursday, May 7, 1903, at 10 o'clock A. M.

In the District Court of the United States, in and for the District of Hawaii.

IN ADMIRALTY.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY (a Corporation),
Defendant.

Stipulation for, and Order Allowing Amendment of Answer.

In the above-entitled cause, it is hereby stipulated and agreed that the answer of the Paauhau Sugar Plantation Company be, and the same is hereby, amended as follows, to wit:

1.

After the word "only" on the twenty-ninth line of page two of said answer insert the following words: "with the exception of the rope slings in which the sugar was transferred from said wharf to said boat, which said slings this defendant avers to have been the property of the Wilder's Steamship Company, Limited."

Dated Honolulu, May 5th, 1903.

J. J. DUNNE,

Proctor for Libelant.

HOLMES & STANLEY,

Proctors for Defendant.

Let the foregoing amendment be and is hereby allowed and ordered filed this 6th day of May, 1903.

MORRIS M. ESTEE,

Judge of said Court.

[Endorsed]: Title of Court and Cause. Stipulation. Filed May 6th, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States, in and for the District of Hawaii.

IN ADMIRALTY.—LIBEL IN PERSONAM.

SAMUEL PALAPALA,

Libelant,

vs.

PAAUHUA SUGAR PLANTATION COMPANY (a Corporation),

Defendant.

Amendments to Answer of Defendant Pursuant to Consent of Libelant and Order of Court.

In the above-entitled cause, by consent and stipulation of the above-named libelant, and an order of said court heretofore duly given and made in said action, the answer of said defendant is hereby amended in the particulars following, and said amendment is hereby made, verified and filed in and to said answer.

1.

After the word "only" on the twenty-ninth line of page two of said answer insert the following words: "with the exception of the rope slings in which the sugar was transferred from said wharf to said boat, which said slings this defendant avers to have been the property of the Wilder's Steamship Company, Limited."

Dated Honolulu, May 6th, 1903.

PAAUHAU SUGAR PLANTATION COMPANY.

By Its Attorneys,

HOLMES & STANLEY.

United States of America,
District of Hawaii. } ss.

W. L. Stanley, being duly sworn, upon oath deposes and says: that he is a member of the firm of Holmes & Stanley, proctors for the defendant Paauhau Sugar Plantation Company; that the said Paauhau Sugar Plantation Company is a foreign corporation; that none of the officers thereof are within the Territory of Hawaii and therefore he makes this verification on its behalf; that he acquired knowledge of the matters and things stated in the above amendment from one Manuel Enos and other employees of the said corporation, and that the matters and things therein stated are true to the best of deponent's knowledge and belief.

W. L. STANLEY,

Subscribed and sworn to before me this 6th day of May, 1903.

[Seal] FRANK L. HATCH,
Deputy Clerk, United States District Court, Territory of Hawaii.

[Endorsed]: Title of Court and Cause. Amendments to Answer of Defendant. Filed May 6th, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States, in and for the District of Hawaii.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY (a Corporation),
Defendant.

Stipulation Setting Time for Trial.

It is hereby stipulated and agreed by and between the above-named parties, that the above-entitled cause be set down for trial and tried on Thursday, the 7th day of May, 1903.

Dated Honolulu, Hawaii, May 4th, 1903.

HOLMES & STANLEY,
Proctors for said Defendant.

J. J. DUNNE,
Proctors for said Libelant.

[Endorsed]: Title of Court and Cause. Stipulation. Filed May 6th, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

From Minutes U. S. District Court, page 341, Thursday, May 7th, 1903.

[Title of Court and Cause.]

Trial.

This case came on regularly this day for trial on the issue joined between the said libelant, Samuel Palapala,

and the said libelee, Paauhau Sugar Plantation Company, proctors for each side being present in open court, and thereupon the trial is proceeded with by the introduction of evidence.

And the hour for adjournment having arrived, the further hearing of this case is continued until 9:30 o'clock A. M., May 8, 1903.

From Minutes U. S. District Court, page 243, Friday, May 8, 1903.

[Title of Court and Cause.]

Trial (Continued).

Now, on this day, again came the libelant by his proctor and also the said libelee, Paauhau Sugar Plantation Company, by its proctor, and the trial is continued by the further introduction of evidence.

And the hour for adjournment having arrived the further hearing of this case is continued until Saturday, May 9, 1903, at 9 o'clock A. M.

From Minutes U. S. District Court, page 344, Saturday, May 9th, 1903.

[Title of Court and Cause.]

Trial (Continued).

This case came on regularly this day for continued hearing, counsel for both sides being present in open court, and the trial is proceeded with by the further in-

troduction of evidence at the conclusion of which the case was submitted to the Court for decision and by the Court taken under advisement, and it was ordered that each side have until Wednesday, May 13th, 1903, within which time to file briefs.

In the United States District Court, in and for the Territory of Hawaii.

IN ADMIRALTY.—Honorable MORRIS ESTEE, J.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU PLANTATION COMPANY,
Defendant
No. 32.

Testimony.

Honolulu, May 7, 1903.

The above-entitled cause came on to be heard before the District Court of the United States for the Territory of Hawaii, this seventh day of May, A. D. 1903, at ten o'clock A. M. of said day.

Appearances:

J. J. DUNNE, Esq., Proctor for Libelant.

HOLMES & STANLEY, Proctors for Defendant.

Whereupon the following proceedings were had.

The COURT.—All witnesses will be excluded except professional witnesses and the witnesses who will sit with respective counsel.

Mr. DUNNE.—I will ask Mr. Stanley to stipulate that George Sea act as interpreter from the English language to the Hawaiian language, and from the Hawaiian language to the English language in this case.

Mr. STANLEY.—I would prefer the regular interpreter.

The COURT.—Unless there is something against this man, the Court will make an order appointing Mr. Sea as interpreter in this case. If at any time you find imperfect or false interpretation you will call the attention of the Court thereto.

George C. Sea was thereupon sworn as interpreter in this case from the English language to the Hawaiian language, and vice versa.

Whereupon HINA, a witness on behalf of the libelant was called sworn, and testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. What is your occupation? A. Sailor.

Q. Do you know the steamer "Helene"?

A. Yes.

Q. Were you at any time a sailor on that steamer?

A. Yes, sir.

Q. During the month of March, 1903, were you a sailor on that steamer? A. I was.

(Testimony of Hina.)

Q. Do you know Sam Palapala, the libelant here?

A. I do.

Q. Was he a sailor on the "Helene" also at this time?

A. He was.

Q. Do you know what wages he was receiving on this steamship "Helene," up to the month of March, 1903?

(Question objected to on the ground that it was not the best evidence as to what this man was receiving?

The COURT.—You can ask him if he knows. If he knows let him answer, if he don't know he can say I don't know, if he does know he can answer.

A. Seven dollars a week.

Q. How do you know he was getting seven dollars per week?

A. Well, I know when he returned to Honolulu seven dollars was paid us. There is the same pay all around.

Q. Were you ever present when he drew his pay?

A. Yes.

Q. Do you remember the time when he got hurt?

A. Yes.

Q. At the time when he got hurt will you tell us what his general physical condition was?

(Question objected to on the ground that it was asking for the conclusion of the witness.)

The COURT.—If he knows. You can ask him whether he was able to work or not.

(The defense noted an exception to the ruling of the Court.)

(Testimony of Hina.)

A. I do.

Q. Describe it.

A. There was nothing the matter with his physical condition, he was in good health.

(The defense moved to strike out the answer on the ground previously urged to the question to which it was an answer.)

(Motion overruled. Exception noted.)

Q. Were you in the boat at the time he got hurt?

(Question objected to as leading.)

The COURT.—It is.

Q. Where were you at the time he got hurt?

A. I was in the boat at the time.

The COURT.—What boat?

A. There were three boats out at Kailua.

Q. Where was the boat at the time that he got hurt?

A. Under the place where the sling load of sugar was to be lowered.

Q. Who were in the boat at the time?

A. Myself, Sam Palapala, Bob Samoa, the boatswain, Kia and David.

The COURT.—How many all together?

A. Five.

Q. And how did he get hurt?

(Question objected to on the ground that it called for a conclusion from the witness.)

(Question withdrawn.)

Q. Describe the circumstances of his being injured.

(Testimony of Hina.)

The COURT.—State the manner of his being injured.

A. This was our second sling load of sugar which was to be—

The COURT.—He was hurt by the second load of sugar lowered?

A. It was lowered half way down, but it was not to be lowered to the boat before we gave the signal, but before we gave the signal it was lowered and he was hurt then.

Q. How did he get hurt?

A. By the sugar. As the sugar was lowered halfway down, Sam Palapala and myself were covering the first load with canvas and before we had it covered and before we notified them, the men in charge of the winch lowered it.

The COURT.—Whose business was it to notify the winchman to lower the sling load?

A. The boatswain's business.

The COURT.—Who is the boatswain?

A. Kia, the one at the back of the boat. He is the one who signals when a large sling load is to be lowered.

The COURT.—He swears he did not signal him, does he? A. No signal was given at all.

Q. Did this sugar strike Palapala on his person in any place?

(Question objected to as leading. Question withdrawn.)

(Testimony of Hina.)

Q. Where, if any, where did this sling load of sugar strike Palapala?

(Question objected to as leading.)

The COURT.—I will allow him to answer.

(Exception noted to the ruling of the Court.)

A. It struck him right on the breast.

The COURT.—Struck whom?

A. Palapala.

Q. When that happened what became of Sam?

A. He fell down with his face up, on the port side, just as they hoisted the sugar up again.

The COURT.—This winchman? A. Yes.

The COURT.—By means of the machinery?

A. It was drawn up again by the machine.

Q. Just after this sugar struck him and just before the winchman hoistedthe sugar up again, did any person in the boat signal to have it hoisted?

(Objected to as leading. Objection sustained.)

Q. What, if any, signal was given by the men in the boat to the winchman just before that sugar was hoisted off of Palapala?

(Question objected to as leading.)

The COURT.—I think you are wrong, the Court will not rule it out.

(Exception noted to the ruling of the Court.)

A. No notification at all from the boat.

Q. Between the place where the boat was and the

(Testimony of Hina.)

place where the winchman was, was there anything to prevent that winchman seeing into that boat?

(Question objected to as leading. Objection sustained.)

Q. Could not the winchman see from his position, into the boat? A. He could see.

The COURT.—He was above them, was he?

A. Yes, he was away up above.

The COURT.—On the wharf?

A. He was further above, he can plainly see from where he was to the boat.

Q. After this happened what became of Sam?

A. He fell into the boat.

Q. What was done with him then, if anything?

A. Bob jumped down and commenced to help him.

Q. What was then done?

A. While he was helping him we rowed away from the place, we went right along until we came to the boat with the first sling load of sugar.

Q. What boat do you mean?

A. Got alongside the "Helene."

Q. When you got alongside the "Helene"? What became of the libelant here?

A. We lifted him up on board the ship.

Q. How did you lift him up on board?

A. He was hoisted up in kind of sling-like, on board. He was hoisted up by the men as it is very high to the deck of the ship from where we were in the boat.

(Testimony of Hina.)

Q. Do you know, and if so, please state how many bags of sugar there were in the sling load of sugar that struck the libelant? A. Ten bags in the sling.

Q. Do you know, and if so please state, what the weight of each of those bags was?

A. I cannot testify about that.

Q. Do you know, and if so please state, what, if anything, was the height of the wharf above the level of the sea? A. I cannot state, I do not know.

Cross-Examination.

(By Mr. STANLEY.)

Q. How long have you known Palapala?

A. Well, quite a while, I have forgotten how long.

Q. About how long?

A. I think over a month.

Q About how long had you known him before this accident occurred? A. About three weeks.

Q. Where did you come to know him?

A. Around the docks here in Honolulu.

Q. How many trips had you made with him on the "Helene"?

A. I think it was a month, we had been together a month on the "Helene."

Q. How many trips?

A. Sometimes two, sometimes three a month, I cannot say.

Q. That would be two or three trips you made with him? A. Yes.

(Testimony of Hina.)

Q. How long have you been employed on the "Helene"? A. About two months.

Q. How often have you seen Palapala drawing his pay? A. As many trips as we made.

Q. What amounts did you see him receive?

A. Seven dollars.

Q. Is the crew of the "Helene" paid off when she arrives in port?

A. Paid off as soon as she arrives here.

Q. Some of these trips extended over a couple of weeks, did they not?

A. Sometimes, yes, two weeks.

Q. If the men had been away two weeks would you still say Palapala received seven dollars?

A. That seven dollars is for one week.

Q. If the trip had been ten days they would not get two weeks' pay, would they?

Mr. DUNNE.—I will willingly stipulate that they would not.

A. They would not draw that week, that is in full. We draw for full weeks, that is all. We draw the balance when the following week is paid.

Q. Is it not a fact that you are paid so much for working days and not by the week?

A. We are paid by the week, not paid by the day.

Q. If you don't work Monday, is it not a fact that you are paid for the remaining five days of the week exclusive of Sunday and not for six days?

(Testimony of Hina.)

A. If we stay away one day we will be docked for it.

Q. How much will you be docked for a day?

A. I have forgotten.

Q. Is it not a fact that you are paid $1.25 a day for working days exclusive of Sundays?

A. Our working days on shore is $1.50; on board steamer I cannot say.

Q. Is it not a fact that you are only paid for the days you actually work? A. That is true.

Q. What was your position in the boat at the time this man, Palapala, got hurt? A. I was a sailor.

Q. What were your duties on the boat?

A. Rowing the boat.

Q. In what part of the boat, the bow or the stern?

A. Towards the bow, away forward sitting in the boat.

Q. On which side of the boat, looking towards the bow? A. On the right side.

Q. Which way was this boat headed, bow toward the sea or toward the shore? A. Toward the sea.

Q. What was the Samoa's position in the boat?

A. He is the one who looks to the sling load of sugar.

Q. What do you mean?

A. They are the ones that lower down the sling to the boat and put it in place.

Q. Who do you mean by they?

A. Samoa and Palapala.

(Testimony of Hina.)

Q. How near to the boat is this sling load before they take hold of it to put it in position?

A. Well, they get hold of it when it is right above their heads.

The COURT.—And put it where they want it to rest?

A. Yes. When they are ready to put it in place, the one in the back of the boat is the one who notifies the winchman to lower it down.

Q. You say the sling load is above their heads, what do they do?

A. As soon as the sling load is right above, where they can catch hold, if they want it front or back, they take their hands and try to get it just where they want it, then the boatswain gives the order to lower it when they are ready.

Q. Then I understand when the sling load comes down, that before it comes down, that the derrick is what lowers it up or down and it can be trimmed into position by the derrick?

A. By the derrick it cannot be set into place because the boat is shifting every now and then. By the aid of these men it can be set in place.

Q. Do I understand you that the winchman lowered it down of his own volition to this point that is just above their heads? That he held it there and awaited the signal from the boat?

A. After the sling load of sugar leaves the wharf and is carried out on the derrick it is lowered down by

(Testimony of Hina.)

the winchman half way. This is way above the men's heads and he holds it there until the boatswain gives the signal to lower it.

Q. When it gets in this position is it held there in position for awhile until the winchman gets another signal to lower it?

A. It is lowered until the sling load of sugar is in position. After it leaves the wharf it goes in and out until it stops swinging and then it is lowered the second time.

Q. After it stops swinging the sailors catch hold of it and swing it into position?

A. After it stops swinging it is lowered down until the people in the boat take hold of it and place it in position right in the boat.

Q. Where is this man Kia, where is his position in the boat?

A. He is supposed to be at the boat's end, the boat's steerer.

Q. Where is he on the boat?

A. In the stern of the boat.

Q. What was the position of David?

A. He is one of those that rows the boat, he is one of my partners.

Q. What position is he in?

A. He is on the next side to my back; I am away forward and he is next to me.

Q. On the opposite side of the boat to you?

(Testimony of Hina.)

A. On the left side of the boat.

Q. While in the boat, I understand your backs, yours and David's were toward the sea? A. Yes.

Q. Besides rowing the boat you had to keep watch of the waves, did you not? A. Yes.

Q. The waves came in behind your back?

A. It is not our business to watch the waves, all we have to do is to obey the orders of the boatswain and when he says "Row" to row.

Q. Have you not stated that it was also your business to watch the waves?

A. Everybody is supposed to do that when it is rough; everybody is supposed to do that.

Q. What was the condition of the sea at the time this accident occurred? A. It was quite rough.

Q. Was the boat dancing around? A. Yes.

Q. Is it not a fact that on this occasion, when this accident occurred, that the waves were dashing over the wharf at intervals—I don't mean every minute?

A. Yes.

Q. So the boat is rising and falling with these big waves.

(Question objected to on the ground that the witness had not said "big" waves, but merely waves.)

Q. Were these waves big waves or small waves?

A. Not very big, quite small.

Q. Was it a very rough sea?

(Testimony of Hina.)

A. It was quite rough in the morning; it was not so bad in the afternoon.

Q. Was it bad at all?

A. In the morning and part of the forenoon, but after lunch it was all right.

Q. Is it not a fact that the weather continued very rough through into the next day?

A. No; in the morning and forenoon it was quite rough, but in the afternoon it cooled down a little.

Q. On this occasion which would be nearest the landing, the position you occupied or the position David occupied?

A. I was the one nearest the wharf.

Q. You were on the side of the boat nearest the landing and he was on the side toward the sea?

A. Yes.

Q. Will you describe the kind of circumstances under which this accident happened?

A. That is the only reason, except it was on account of the winchman.

Q. I want to know what the winchman did?

A. He lowered the sling load of sugar without being notified to do so.

Q. You say Palapala was one of the men whose duty it was to receive the sling load, to take hold of it when it got within a certain distance? A. Yes.

Q. Whereabouts in the boat was Palapala at the time the accident occurred?

(Testimony of Hina.)

A. He was near the middle of the boat at the time he met with the accident. In the middle, but a little toward the stern.

Q. On the side nearest the landing or the other side?

A. Nearest the landing.

The COURT.—Nearest the wharf?

Mr. STANLEY.—That is what I call the landing.

Q. Was his back to the landing or his face to the landing?

A. With his face out toward the sea.

Q. What was he doing at the time the accident occurred?

A. They had not gotten through fixing up the first sling load of sugar they had received. They were working on it.

Q. What were they doing to it?

A. They were covering it. The canvas cover had gotten under the first sling load of sugar and they were trying to get it from under to put it over the side of the boat.

Q. Palapala had no warning that that sling load of sugar was coming? A. No.

Q. No warning at all? A. No.

Q. No warning from the crew of the boat or by the winchman?

A. No; he did not expect that they would lower the sling load of sugar.

Q. Up to the time it struck you heard no warning

(Testimony of Hina.)

either by members of the crew of the boat or by the winchman? A. None at all.

Q. How quickly did it happen?

A. At quite a short time. He was just commencing to rise.

Q. Who was commencing to rise?

A. Palapala. He had just pulled up this cover just lying alongside and commenced to stand up when he was struck by this sling load of sugar.

Q. Where did you say he was struck?

A. Right on the breast here. (Indicating.)

Q. After he had been struck, what was the next thing done?

A. The Portuguese, the winchman, he hoisted it up again and Bob got hold of Palapala.

Q. Who gave the signal to the winchman to hoist it up?

(Question objected to on the grounds, first, that it assumes that somebody did give a signal. Second, that it flatly contradicts the direct testimony of the witness that the winchman hoisted the sugar without any signal.)

The COURT.—So far as the first objection is concerned, I think it is good. So far as the second is concerned, I think that he has a right to test the witness. Reform your question.

(Question withdrawn.)

Q. What kind of signal is usually given the winch-

(Testimony of Hina.)

man when required to either lower or raise the sling load?

A. The signal to lower is the waving of the hands; it means "lower down easy." When not lowered where we want it we waive our hands upward to hoist.

Q. The order is given the winchman, the signal is by hand and not by word of mouth?

A. By waiving of hands and also by calling out. When a man hollers out that means that he is in a position to lower altogether.

Q. On this occasion when Palapala was struck, how far toward the bottom of the boat did this sugar descend?

A. The sling load fell on him on the edge of the boat, when it was hoisted up again he fell in the bottom of the boat.

Q. Do I understand that Palapala was knocked against the side of the boat and when the sugar was hoisted up he fell in to the bottom of the boat?

A. Most of his body was in the boat when he was struck, but he was partly on the edge. When they hoisted it up he was in the boat.

Q. Is it not a fact that he was in the boat and that he was knocked with his back on the edge of the boat?

A. Yes, that is the time he was knocked down with the sling load of sugar. He was knocked down onto the edge of the boat and then fell into the boat.

Q. What did you do when you saw him struck with the sugar?

(Testimony of Hina.)

A. We could not do anything because we had to look out for the boat, we had to attend to it; otherwise there would be pilikia.

The COURT.—What is *pilakia*?

A. Trouble.

Q. What pilikia would you have been in?

A. If we didn't look out for our oars the boat would be smashed, then we would be in peril.

Q. What would smash the boat?

A. We were quite near the landing, we would be dashed against the landing.

Q. What would dash you against the landing?

A. Yes; the waves would dash us against the landing if we didn't look out for the boat with our oars.

Q. As I understand it when the sling load struck Palapala that sling load was between you and Kia, who was in the stern of the boat?

A. No; between me and Kia and between Palapala and Bob.

Q. I understand that he was in the middle of the boat and you were in the bow and Kia in the stern?

A. Yes, it was between me and Kia.

The COURT.—What is the object of all this?

Mr. STANLEY.—He has sworn that no signal was given and I want to bring out the facts.

The COURT.—Go ahead, there must be an end to this case.

(Testimony of Hina.)

Q. When this accident happened when the sugar came down you were tending to your own business, were you not?

A. Yes, I mind my own business.

Q. You were not watching the rest of the crew of that boat to see whether or not any one of them gave a signal?

A. Nobody called out to the winchman.

Q. You were watching the water and not the crew of the boat to see what signals they made with their hands?

A. All of us didn't do anything, we didn't call out.

The COURT.—What do you mean by "all of us didn't do anything?"

A. Every one of us on that boat didn't call out.

Q. You all kept still, did you?

A. We were doing our work; we didn't say anything at all.

Q. You are sure that from the time Palapala and Samoa were taking out this canvas from the first sling load of sugar until the second sling was hoisted up by the winchman that no one in the boat called out.

A. Nobody called out.

Q. You mean to say that there was no expression, no shouting?

A. No, nobody gave any signal when it was lowered down or when it was hoisted up again.

Q. You say there was no shouting being done by the

(Testimony of Hina.)

crew of the boat from the time of getting this canvas from under the first sling load until the sugar was hoisted up again? A. No one said a word.

Q. I am not referring to signals, shouting of any kind. A. No one called out.

The COURT.—What nationality was this man at the winch?

Mr. STANLEY.—Portuguese.

Q. Do I understand that no shouting amongst yourselves or any shouting of any one in the boat to the winchman occurred from the time when you first got this canvas in the boat free from the first sling load, until the second sling load was hoisted up again?

A. No one of us called out.

Q. Either to the winchman or to one another?

A. No, no one of us called out.

Q. You say Bob Samoa assisted this man. What assistance did he give him?

A. When he met with that accident right after they hoisted the sling load of sugar, Bob heard Palapala cry and commenced to lomilomi (and help massage) and help him to a better place, than where he was in the boat.

Q. What position did he put him in?

A. Right in the middle of the boat.

Q. Sitting up?

A. No, lying down with his face up.

(Testimony of Hina.)

Q. What cry was that Palapala gave, what did he say?

A. Just when he was struck the force of the sling load made him give a kind of a grunt.

Q. Did Palapala assist himself as well as Bob?

A. When he fell in the boat he was lying there still, he could not move.

Q. How do you know he could not move?

A. When Bob was helping him—massaging him, he could not move at all.

Q. How long was it after that that you brought him up to the steamer?

A. The time when he was hurt and Bob was assisting, that time we were rowing. We rowed right out to the steamer.

Q. How did you get him aboard the boat?

A. Strung up ropes and hoisted him up. Getting him into position with ropes, we hoisted him up. We tied up the ropes so we could hitch him in and hoisted him up easily until he came to the steamer.

Q. Was he hoisted by the crane?

A. By the steam.

Q. You have stated it was Kia who gave the signal for the lowering or raising of that sugar, who else in that boat could give such a signal?

A. He is the only one who gives this signal. In very calm times anyone can give the signal to the winchman.

Q. So that the custom of giving the signal differs according to the weather?

(Testimony of Hina.)

The COURT.—You need not argue the case.

Mr. STANLEY.—I am simply trying to find out the custom.

The COURT.—If he states it, it does not follow that the Court could be controlled by it.

Q. How long have you been a sailor on the "Helene"?

A. About a month.

Here ends the testimony of Hina.

The Court here ordered a recess until two o'clock to-day.

Upon reconvening at two o'clock, KEWIKI, a witness on behalf of the libelant, was called, sworn and testified as follows.

Mr. STANLEY.—I would like to have an order, that as the witnesses leave the stand, they are not to communicate to the other witnesses the testimony they have given.

The COURT.—It is so ordered.

Direct Examination.

(By Mr. DUNNE.)

Q. What is your occupation?

A. I am a sailor.

Q. On what ship? A. The "Helene."

Q. How long have you been a sailor on board that ship? A. Over one year.

Q. Do you know Samuel Palapala, the libelant in this case? A. I do.

Q. Were you present at Paauhau, on the Island of Hawaii, on the occasion when he got hurt?

(Testimony of Kewiki.)

A. Yes.

Q. At the time when he got hurt, where was he?

A. On the boat.

Q. What boat, the big boat or the small boat?

A. The small boat.

Q. Where was the small boat?

A. Alongside the wharf.

Q. How did you come to be in that boat, at that time?

A. We rowed up from the ship to the wharf.

Q. How did you come to row from the ship to the wharf?

A. We rowed from the ship to the dock for sugar.

Q. Who sent you? A. The captain.

Q. Who were in the boat's crew that were sent for that purpose?

A. Kewiki, Hina, Bob, Samuel Palapala and Kia.

The COURT.—How many is that?

A. Five altogether.

The COURT.—Five men all together in this little boat? A. Yes, sir.

Q. When the boat got in near the wharf, what happened?

A. When we went up, there was nothing in the boat. We went up until we got alongside of the wharf with the boat for sugar to be loaded.

Q. When you got out there to that point, tell what occurred?

A. When we got alongside the dock, we got the first sling-load of sugar. It was all right, nothing happened;

(Testimony of Kewiki.)

the second sling-load of sugar is the sling which Palapala met with the accident.

Q. How did it come about, that the second sling-load of sugar should hurt this man?

A. It was on account of the winchman lowering the sling load of sugar without being notified to do so.

Q. When the sling load of sugar came down, describe how it came down, whether fast or slow—the second sling-load?

A. It was a Japanese that had charge of the sling load of sugar, and first prepared to hoist it up to the winchman. He gave orders and they hoisted it until it was one foot above the dock, when he then gave the signal to push it off, then the winchman lowered it out half way.

Q. What we want to know is, at the time when it struck Palapala, did it come down, fast or slow, how did it come down? A. It came down very fast.

Q. Where in the boat were you, at the time of this occurrence?

A. I was standing alongside the boat, standing on the boat.

Q. Who was the next man to you? A. Hina.

Q. I will ask you whether you saw the sugar at the time when it struck Sam?

A. I saw the sling load of sugar. I saw it when Palapala was hurt.

Q. Where did it strike him?

A. On the chest here. (Indicating.)

(Testimony of Kewiki.)

Q. What happened to Palapala just after that? Tell just what happened then and there?

A. I heard a groan, right off. He was struck by the sling load, then he fell into the boat, and laid there as if he was dead.

Q. While he was lying there as if dead, did anybody go near him? A. Yes, Bob.

Q. What did Bob do, if anything?

A. He went and began to massage him.

Q. What was done then, what was the next thing that happened?

A. The boatswain instructed us to row.

Q. Where did you row the boat to?

A. We rowed to the steamer.

Q. When you got to the steamer, what was done, if anything, with Sam?

A. There was a sling of the boat run, and Sam was hoisted aboard the steamer.

The COURT.—By the steam apparatus?

A. Yes.

Q. Now, when this sugar struck the libelant, what became of the sugar?

A. The winchman hoisted it up again.

The COURT.—That is, the winchman hoisted it up, is that so? A. Yes, sir.

The COURT.—Could the winchman see that boat, from his place at the winch? A. Yes, he can see.

The COURT.—The winchman could see the libelant when he was hurt? A. He can see.

(Testimony of Kewiki.)

Q. I will ask you if, before the winchman hoisted up the sugar again, whether anybody in the boat said anything?

(Question objected to as leading. Question withdrawn.)

Q. Between the point of time, when the sugar struck Palpala, and the point of time when the winchman hoisted the sugar up again, did anything happen in the boat, and if so, what? A. Yes.

Q. What?

A. It was the sling load of sugar (after counsel repeats the question). I don't remember.

Q. How soon after the sling load of sugar struck Palapala was it that the winchman hoisted it up?

A. I can see it, the bags of sugar rest on him, and were hoisted up again.

Q. Give your best recollection as to the interval between the time the sling load struck him, and the time it was hoisted again?

The COURT.—You need not give the exact time, no one stands with a watch in hand, while another man is being hurt. A. About two minutes.

Q. Between the point of time when the sugar struck him, and the point of time when the winchman hoisted the sugar off Palapala. Do you know whether anything was said by anybody in that boat, to that winchman?

(Question objected to as being leading.)

The COURT.—The Court will let him answer.

(Exception noted by the defendant.)

(Testimony of Kewiki.)

A. No one of us called out.

The COURT.—Whether nothing was said?

A. No.

Q. Do you know how many bags of sugar were in that swing load, and if so, state it?

A. I know, there were 10 bags in that sling load.

Q. Do you know what the weight of each bag was?

A. I do, each bag weighed 125 pounds.

Q. You say that you have been employed upon the "Helene" for over a year. I will ask you if you know what wages Sam Palapala, the libelant, was earning as a seaman, on that vessel?

A. I know he received $7.50 per week.

Q. Just before this accident happened, do you know what the physical condition of the libelant here, was?

(Question objected to on the grounds that it called for a conclusion of the witness.)

The Court.—He can state his physical condition if he knows, as to whether he was able to perform his usual work. The objection is overruled.

(Exception noted by the defendant.)

A. Good physical condition, a strong man.

The COURT.—Before the accident, he was a good sailor, was he? A. Yes, sir.

Q. I will ask you to describe the condition of the weather, on the day this thing occurred? I use weather in the sailor's sense, meaning both wind and sea.

A. In the morning it was quite windy and rough.

(Testimony of Kewiki.)

The COURT.—The wind was blowing in the morning, it was then rough?

A. Quite rough. In the afternoon it had calmed down.

Q. Were there any waves in the afternoon?

A. There were some waves, but all small ones.

Cross-Examination.

(By Mr. STANLEY.)

Q. How long have you known Palapala?

A. Ever since I have worked on the "Helene."

Q. How long is that? A. Over one year.

Q. What do you say his wages are—Palapala?

A. Seven dollars and fifty cents a week.

Q. Is it not a fact that the sailors on the "Helene" are paid so much per day, for working days?

A. They are not paid by the day.

Q. So, whether you worked three days in the week or six days, you got the same? A. No.

Q. Is it not a fact that you are paid $1.25 a day per working day, so that if you lay off Monday, don't work Monday, and simply work 5 days in the week, you get $6.25, instead of $7.50?

The COURT.—Right up here he said no. You asked him before if he didn't get the same for working three days, or working all the week, and he said no, he didn't get the same. A. Yes.

Q. Sundays are excluded? A. No.

Q. You are not paid for Sundays? A. No.

Q. You are only paid for the time you actually work?

(Testimony of Kewiki.)

A. Yes.

Q. What was your position on this boat, on which side of the boat were you at the time Palapala got injured?

A. I had one of the oars of the boat.

The COURT.—That is, he was a sailor, not an officer? What side was he on? A. The left side of the boat.

Q. Were you facing the bow or the stern of the boat?

A. Facing toward the front.

Q. Which way was the bow of the boat pointed? Toward the open sea, or toward the shore?

A. Facing towards the sea.

Q. What was Palapala's position in the boat?

A. He was one of the crew.

Q. Where was he stationed in the boat?

A. He was right in front of the officer of the boat. The captain of the boat.

Q. What is his name?

A. Kia, the boat steerer.

Q. On which side of the boat was Palapala?

A. He was standing in no particular place; he was always here and there in the boat.

Q. At the time of this accident, what was his position?

A. He was on the right side of the boat, in the boat.

Q. That was the side nearest to the wharf, the landing? A. Yes, sir.

Q. Now, at the time of the accident, which way was he facing, towards the landing or towards the inside of the boat?

(Testimony of Kewiki.)

A. He was not facing either way. He was fixing the canvas, which was under the sling load of sugar.

Q. You mean he was looking into the bottom of the boat, fixing the canvas? A. Yes.

Q. Well, about his back; which was it, was his back to the landing, or did he face towards the landing?

A. He was facing out.

Q. With his back to the landing?

A. Yes, facing out to sea.

Q. How many sling loads of sugar were in the boat at the time of the accident? A. One.

Q. In what position in that boat was the sling load, crossways or lengthways of the boat?

A. Lengthways of the boat.

The COURT.—That is the sacks laid lengthwise?

A. Yes.

Q. When this second sling load of sugar were swung out over the landing, what was the first thing that was done with it?

A. The first thing that is done, is to pull the sacks of sugar in the sling, and hook the sling to the hoist, and the Japanese instructed the winchman to hoist until it was a foot above the level of the wharf, and push it out over the boat.

Q. What was the next thing done to it after it after it was pushed out?

A. It was lowered down halfways.

Q. When the second sling load was lowered down halfway, what usually happened?

(Testimony of Kewiki.)

(The libelant objected to the question on the grounds that it was foreclosed by the pleadings.)

The COURT.—Let me see the pleadings?

Mr. STANLEY.—We admit in the pleadings that the appliances are described in the libel.

The COURT.—You say also "whereby the sugar is transferred."

Mr. STANLEY.—Read further.

(Objection overruled.)

Q. For what purpose was this sling load lowered halfway down?

A. So that when he got instructions from the people in the boat he could lower it all together.

Q. Is it not a fact that it was lowered part ways down; it was lowered just above the heads of the people in the boat, so that they could reach it?

A. No.

Q. At no stage in the lowering, was it lowered, so that the people in the boat could reach it, and take hold of it, and trim it into position? A. No.

Q. I understand, then, that the people in the boat could not touch the sling load, while being lowered, until it got into the bottom of that boat?

A. Some time they does that.

Q. Does what?

A. There is some one to see that the sling load is placed right where they want it in the boat. We watch it all the time.

(Testimony of Kewiki.)

Q. Don't two men in the boat stand there, ready to trim it as oon as it gets into their reach, so that it will go into the right position?

A. They cannot hold onto it at that time.

Q. At what time do they hold it?

A. The only time they touch those bags, is when there is a calm, and the waves are not large, that is the time they waive to the winchman to lower it down.

Q. The only time they touch it is when it is calm?

A. Yes, sir.

Q. What do they do in rough weather?

The COURT.—In landing sugar?

Mr. STANLEY.—Yes.

The COURT.—Let him answer.

A. They don't do anything; they only stand there. We oarsmen do all the work, we take orders from the boat steerer.

Q. What do the two men in the boat, one on each end, besides the oarsmen, do?

A. The only way to tell it is calm enough, is for the boat to be right under the sling load of sugar, then the winchman is told to let go.

Q. Is it not a fact, that whether it is rough or calm, these two men have to get hold of that sling load and direct it to the position in the boat?

A. That is their duty.

Q. And the point at which they catch hold of it, is when it is just over their heads?

(Testimony of Kewiki.)

A. They don't catch hold until the boat is right under the sling?

Q. Then it is right over their heads?

A. I don't understand.

Q. Is it not a fact, that when loading the sugar, two men, not oarsmen, are stationed in the boat, and when the sugar is coming down, it is lowered to a point where they can reach it?—

The COURT.—It is in proof that this sling load was brought to within four or five feet of the boat, and then stopped.

Mr. STANLEY.—Very well.

Q. Is it not a fact that they stand there ready to receive it when it comes within their each, and that they trim it, so that it can lie alongside the other sling load in the boat?

A. Yes, that is what they do.

The COURT.—Two men guide the sugar?

A. Yes.

Q. In what position should the second sling load of sugar be placed in the boat?

A. The right side of the boat.

Q. Side by side with the other sling load?

A. Yes.

Q. The boat will just carry two handily side by side?

A. Yes.

Q. Then if you got in three or four, you put them

(Testimony of Kewiki.)

on top of the other two, and put them crosswise in the boat, instead of lengthwise?

A. There are four slings to a boat load?

Q. But you can only get two lengthwise in the bottom of the boat?

A. Four sling loads lying the same way, two ahead and two aft.

Q. So it requires some skill, does it not, to place the second sling load in the proper position, side by side with the first? A. Yes.

Q. You said the second sling load rested on Palapala about two minutes, where was Palapala when the sugar was on top of him?

The COURT.—He said it was two minutes from the time the sling load struck him, until the winchman pulled it up.

Q. Where was Palapala when the sugar was raised off of him?

A. Palapala was on the right side of the boat.

Q. In what position when the sugar was raised off of him?

A. He was like a dead man. He laid on the right of the boat, in the boat.

Q. You mean in the bottom of the boat toward the right, or standing up leaning against the right of the boat?

A. No, he laid on the right side of the boat, in the boat.

(Testimony of Kewiki.)

Q. In the bottom of the boat?

A. No, on the boat.

Q. Describe exactly how it was?

A. When he was struck by the sling load of sugar, he fell face up on the edge of the boat, on the right side.

Q. How long did the sugar rest on him there?

The COURT.—Tell him we don't expect him to give the exact time, but about how long.

A. About two minutes, I am not sure.

Q. What did he do after the sugar was hoisted up again—Palapala?

A. He fell from the edge of the boat into the bottom of the boat.

Q. How long before the sugar struck Palapala, did you know that it was coming down?

A. I think it was about two minutes.

Q. What did you do? A. Rowed on the boat.

Q. What, if anything, did Samoa do in the assistance of Palapala?

A. He got ahold of Sam Palapala, and lifted him up to a better place from where he was, and commenced lomilomi or massage.

Q. You said the waves that afternoon were very small, about how large were they?

A. I cannot state how high the waves were.

Q. Is it not a fact that the waves were dashing over the landing? A. No.

(Testimony of Kewiki.)

Q. About what time was it that the sea calmed down? A. After 12 o'clock.

Q. What time was the accident?

A. After 12 o'clock.

The COURT.—How much after?

A. I think it was between one and two o'clock.

Q. How much was it after 12 o'clock when the sea calmed down? A. I don't know.

Q. I want to know about the weather after 12 o'clock; tell us, if you can, how much after 12 o'clock it was, that the sea calmed down?

A. I think it was half an hour after 12 o'clock.

Q. How long after the accident did you continue to work taking sugar on that day?

(Question objected to on the ground that it is hearsay evidence, unless it is shown that the time and place mentioned, and in the performance of things done, the libelant here participated, the point being that this libelant cannot be bound by what was done by others out of his presence, or behind his back.)

Mr. STANLEY.—I want to see whether it was too rough to work.

The COURT.—You ask him any question you want to, or you can lead him, but you cannot ask him what this man did when the libelant was not there, or what the others did.

(To the Interpreter.) Tell him the Court wants to know how fast—if that sling load, that is charged with

(Testimony of Kewiki.)

injuring this man, whether it came down so fast, that the two men who stood in the boat could not catch it and regulate it? A. Yes, it came down very fast.

The COURT.—Did it come down so fast that the two men, who were to catch the sling load as it dropped down—did it come so fast that they could not catch it and guide it into the boat? A. Yes.

Here ends the testimony of Kewiki.

Whereupon BOB SAMOA, a witness on behalf of the libelant, was called, sworn and testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. What is your name? A. Bob Toka.

Q. Isn't your name Samoa? A. No.

Q. What is your occupation? A. A sailor.

Q. Do you know the steamship "Helene"?

A. I do.

Q. Were you employed upon her recently?

A. Yes.

Q. In what capacity? A. As a sailor.

Q. Do you know Samuel Palapala, the libelant in this case? A. Yes, I do.

Q. How long have you known him?

A. Quite a long time.

Q. What was his position in the ship?

A. A sailor.

(Testimony of Bob Samoa.)

Q. Do you know of your own knowledge what wages he got? A. Seven dollars and fifty cents.

Q. Do you know whether or not his father is living?

A. His father is living.

Q. Do you know whether or not he assists in the support of his father?

A. Question objected to upon the ground that it is not the best evidence.

The COURT.—It doesn't make any difference whether he does or not. He can prove any fact relative to the effect of that injury, even upon men who are his relatives.

Q. I will ask you if you know, of your own knowledge, whether Samuel Palapala is assisting in any way, and if so, in what way, in the support of his father.

A. Yes, he supports him.

Q. How do you know that?

A. I have seen him hand money there to his father.

Q. How frequently? A. Very often.

Q. How much money?

The COURT.—I don't think that is supporting his father.

Mr. DUNNE.—My claim is that he assists in the support of his father. We will get direct evidence about that. I only wish to show that claim.

The COURT.—On offer to show is not proof.

Mr. DUNNE.—We offer to show by the direct testimony of the libelant, on the grounds of being one of the

(Testimony of Bob Samoa.)

direct allegations of the libel herein, which is not denied in the answer, nor admitted, that this libelant had actually, and in fact generally contributed to the support of his father. We offer in order to corroborate that testimony, the testimony of a fellow sailor in the same ship, who has frequently seen him give his father money?

The COURT.—Let him answer the question, if he follows it up all right, if not, you can move to strike it out, and it will be stricken out.

(The defendant noted an exception to the ruling of the Court.)

A. Two or three dollars at a time.

Q. How frequently would these times come?

A. On Saturday, when he would give his father this.

The COURT.—When he was paid off?

A. No, when he goes away, he leaves an order with the paymaster, to give his father money on Saturdays.

(The defendant asked that the evidence be stricken out.)

The COURT.—The Court will rule it out, but that counsel states that he intends to prove directly, that he was assisting in the support of his father. He has a right to prove that, and he has a right to adopt any way to reach the facts. He can prove it by this man, and you will have a chance to cross-examine him. The Court rules that counsel can adopt that way, provided he connects it; if he don't, and you move to strike it out, it will be stricken out.

(Testimony of Bob Samoa.)

(The defendant noted an exception to the ruling of the Court.)

Q. Who is this paymaster that you were speaking of?

A. The paymaster's name is Joe Fern.

Q. Who is Joe Fern? A. A half white.

Q. Is there any relation between Joe Fern and the Wilder Steamship Company, and if so, what?

A. Yes, he is. He is the one that ships men. Who gets men for the steamers.

Q. What, if anything, did you hear Samuel Palapala say to Joe Fern, of the Wilder Steamship Company, about libelant's father?

(Question objected to on the grounds that a conversation with Joe Fern cannot be binding upon the Paauhau Plantation Company, Fern not being an officer of that company.)

The COURT.—Counsel says he is going to connect it, if he don't, I will strike it out.

(The defendant noted an exception to the ruling of the Court.)

A. I didn't hear any conversation between Joe Fern and Palapala.

Q. Didn't I understand you to say a minute ago something about a paymaster? Now, I ask you in reference to that paymaster, and you said his name was Joe Fern. I want to know, how it is you know, if you do know, that any orders were left by the libelant with Joe Fern, to assist his father from his wages.

(Testimony of Bob Samoa.)

(Question objected to upon the grounds that it contained three or four questions. Objection sustained.)

Q. When you mentioned the paymaster, what fact did you know, of your own knowledge, which led you to refer to that paymaster at all, in connection with the support of libelant's father?

A. I didn't say Joe Fern and his father. I said he left orders with Joe Fern, that Samuel Palapala instructed Joe Fern to give money to his father.

(The defendant moved to strike out the answer, on the grounds that it was irresponsive to the question. Motion granted.)

Q. Were you present on any occasion when the libelant said anything to Joe Fern relative to the support of Palapala's father?

(Question objected to as leading, also on the grounds that counsel was cross-examining his own witness.)

The COURT.—I will let him answer.

A. I was.

Q. What, if anything, did you hear libelant say to the paymaster of Wilder's Steamship Company, relative to the support of libelant's father?

A. He instructed Joe Fern, when my father comes down to see you, you give him $2.00.

Q. If anything else was said, what was it?

A. No, that was all.

Q. I am going to ask you a leading question. Don't answer it until the Judge says you may. When he said

(Testimony of Bob Samoa.)

if my father comes down, you give him $2.00, did he mean a single $2.00, or did he mean $2.00 at certain stated times?

(Question objected to as leading, and calling for a conclusion. Question withdrawn.)

Q. On this occasion, when you were present and Palapala gave these instructions to the paymaster of the Wilder's Steamship Company, that you have testified to, did he say or not, whether Joe Fern should give his father a single sum of $2.00 or whether to give him it, at stated periods afterwards.

(Question objected to as leading.)

The COURT.—It is leading. It is not necessary to ask a question like that.

Q. When he referred to $2.00 did he say anything, as to how it should be paid?

(Question objected to as leading. Objection sustained.)

Q. When Palapala was speaking to Joe Fern, the paymaster of the Wilder's Steamship Company, relative to these $2.00; state if you recollect what Palapala said?

A. All I heard is what Palapala instructed Joe Fern. You give my father each and every Saturday he should come $2.00.

Q. Now, at the time that Palapala got hurt at Paauhau, were you in the boat? A. Yes.

Q. Just before he got hurt, describe in a general way, his physical condition?

A. Good physical condition.

(Testimony of Bob Samoa.)

The COURT.—Was he a capable sailing man?

A. Yes.

Q. Just describe in your own way, how it was that Palapala got injured on that occasion?

A. We were on the boat, and the boat was shifting out and in, out and in, when this sling load of sugar fell.

Q. Just before this sling load of sugar fell, what, if anything was said or done, by the men on the boat?

A. Somebody was hurt. There was nothing said.

Q. Do you know how many bags of sugar there were in that sling load? A. Ten bags.

Q. Can you state what the weight was of each bag?

A. One hundred and twenty-five.

The COURT.—One hundred and twenty-five pounds, you mean? A. Yes.

The COURT.—In each bag? A. Yes.

Q. When the sugar was hoisted in the derrick, and the derrick swung out over the water, what was done with the sugar?

A. It is kept there until the boat is right under it.

Q. Kept where?

A. Half way from the derrick to the sea.

Q. Why is it kept there?

A. It is kept there until the boat is right under it, when he lowers it down into the boat.

Q. When is that done?

A. When someone calls out to lower it.

Q. Calls out to whom? A. The winchman.

(Testimony of Bob Samoa.)

Q. On the occasion when Palapala got hurt, had anybody called out to the winchman, to drop the sugar?

A. No one called out.

Q. When the sugar fell, where did the sugar strike him?

A. Right on the breast. (Indicating his right breast.)

Q. How did that sugar come down? Fast or slow?

A. Very fast.

Q. When it struck him, what was the next thing that happened? A. I jumped down and helped him.

Q. What became of the sugar?

A. It was hoisted up again.

Q. Who hoisted it up? A. The winchman.

Q. Had any signal been given by anybody in the boat, to the winchman to hoist up that sugar?

A. No.

Q. Can the winchman see the boat from the place where the apparatus is, the winch? A. He can.

Q. When this sling load of sugar was lifted up by the winchman, what was Sam Palapala's condition?

A. He laid over as if he was dead.

Q. What did you do with him?

A. Lomilomi him.

Q. After that, what was done?

A. We went aboard the steamer.

Q. After you got out to the steamer, what was done with him?

(Testimony of Bob Samoa.)

A. We came alongside and we fixed a sling for to hoist him upon deck, and he was hoisted up on deck of the steamer.

Q. I wish you would describe the condition of the wind and sea, at the time when this happened?

A. It was very rough in the morning. I only say it was very rough. After lunch it calmed down a little.

Q. About what time was it, when the change happened in the weather?

A. It was after dinner. I can't say regarding the time.

Q. About what time was it, when this boat went out for this boat load of sugar, at the time of this accident?

A. I can't say. It was right after lunch. It may have been two o'clock, it may have been three o'clock. I don't know.

Q. When you came in and got alongside the wharf, I wish you would describe the kind of waves which were there, at that time and place, that afternoon, alongside the wharf? A. I saw the wind at that time.

Q. How big were the waves?

A. Sometime the waves rose as high as the wharf and farther down.

Q. At the time this man got hurt did not a large wave come under the boat and jump the boat up, or did the sugar come down and hurt him?

(Question objected to as argumentative. Objection overruled. Exception noted by the defendant.)

(Testimony of Bob Samoa.)

A. It was the falling of the sugar into the boat that hurt Palapala.

Q. You have said that the sling load of sugar that hurt this man came down very fast. Did that sling load come down so fast that its descent could not be regulated?

(Question objected to as leading.)

The COURT.—It is leading, strike it out.

Q. Could the descent of that sugar at that time and place have been regulated? A. No.

Cross-Examination.

(By Mr. STANLEY.)

Q. How long have you been employed on the steamer "Helene"?

A. Between one and two years.

Q. How long have you known Palapala?

A. One year.

Q. Where did you first come to know him?

A. In Honolulu.

Q. Was he on the steamer?

A. I was acquainted with him in Honolulu, then afterwards when he boarded the steamer.

Q. You have known him altogether about a year?

A. Yes.

Q. Where does Palapala live?

A. I don't know.

Q. Where does his father live?

A. At the camp.

(Testimony of Bob Samoa.)

Q. What camp? A. The Kalihi camp.

Q. Where do you live? A. On the steamer.

Q. When the steamer is in port where do you live?

A. Out at Kalihi camp.

Q. You don't know where Palapala lives?

A. No.

Q. Where was it you say Palapala gave his father two or three dollars? A. Down to the wharf.

Q. How often?

A. I saw him give money to his father four or five times.

Q. Within the year you have known him?

A. Yes.

Q. Do you know whether or not the old gentleman, Palapala, has any other relatives?

A. I don't know.

Q. So you don't know whether anybody else gives him money?

A. I don't know whether anyone else gives him money.

Q. How old is Palapala, Senior?

A. Between forty and fifty.

Q. This man's father? A. Yes.

Q. What does he do for a living?

A. I don't know.

Q. When was it you heard Palapala tell Joe Fern to give Palapala, Senior, some money ?

A. When he was down to the wharf he told Joe Fern —this was when he instructed him.

(Testimony of Bob Samoa.)

Q. On only one occasion that you heard this?

A. I have heard him very often tell him so.

Q. How often?

A. I cannot say how many times, I have heard him, very often.

Q. Palapala's father's name is Palapala also?

A. Yes.

Q. You have seen him give his father between ten and fifteen dollars in actual cash?

A. I don't know when he handed money to him.

Q. You have never seen him hand him money?

A. I have not seen him hand him money.

Q. So it was a mistake when you told Mr. Dunne that you had seen him give him two or three dollars?

A. I did not state anything like that. I said I have heard he has been giving money to his father. The instructions to Joe Fern is what I know.

Q. You are stating now that you have not said to Mr. Dunne that you have seen Palapala give his son two or three dollars at a time?

(Question objected to as not sufficiently definite; that the use of the pronoun "him" evidently misled the witness.)

The COURT.—He stated it seveal times. The Court understood it that he had not seen the money passed but he heard him order the cashier to pay his *father* two dollars.

The Court here ordered an adjournment until 9:30 the next morning.

In the United States District Court, in and for the Territory of Hawaii.

IN ADMIRALTY.—Honorable MORRIS M. ESTEE, J.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU PLANTATION COMPANY,
Defendant.
No. 32.

Honolulu, May 8, 1903.

The hearing of the above-entitled cause was resumed at 9:30 o'clock this 8th day of May, nineteen hundred and three, pursuant to adjournment of the day before.

Present, libelant and his proctor, J. J. Dunne, Esq., and the defendant and his proctors, Holmes and Stanley.

Cross-examination of Bob Samoa was resumed.

(By Mr. STANLEY.)

Q. Have you or have you not seen Palapala give his father money?

A. I have seen Palapala give money to his father. I have not seen Joe Fern give him money.

Q. How often?

A. About two or three different times.

Q. When this boat in which this accident took place, went in to receive sugar, you say her bow was facing toward the sea or toward the land?

A. The bow of the boat was toward the sea.

(Testimony of Bob Samoa.)

Q. Then the boat was headed out toward the waves?

A. Yes.

Q. What would be the effect of the waves upon that boat?

A. Always shifting forward and backwards.

Q. Rising and falling?

A. It does not rise up but goes forward and back.

Q. Does not, as a matter of fact, the boat rise and fall with the waves?

A. No it does not, nothing only the boat goes back or runs forward.

Q. Would not the effect of the waves, coming in as high as the wharf be to raise the boat?

A. Well, when aboard the steamer we see the waves as high as the wharf. We don't go up to do any work at all.

Q. Now, if the waves were half as high as the wharf, would not the boat rise and fall with the sea?

A. It does not rise and fall, only goes forward and back.

Q. Even if the waves are half as high as the wharf?

A. I don't know anything about that, if it did rise as high as the wharf. I never went there beyond half way.

Q. Is it not a fact that on the very trip before this accident took place the boat was raised by the waves and dashed on the rocks?

A. Well, the waves are not as high as the wharf,

(Testimony of Bob Samoa.)

they are pretty good sized waves, and when these waves would come they dash the boat on the rocks.

Q. Raised it and dashed it on the rocks?

The COURT.—That is practically what he says.

Q. When you referred to landing at Paauhau, you mean a landing on the windward side of the coast of Hawaii? A. Yes, facing the wind.

Q. About half way between Kohala and Hilo?

A. I cannot say, I did not see, so I don't know, I can't say.

Q. From what direction was the wind blowing that day? A. From over the makai (seaward) side.

Q. When the wind is blowing from that direction, is not the windward coast of Hawaii very rough?

A. Well, not always rough. In the morning, of course, it was quite rough, but not in the afternoon.

Q. I am not talking about any particular day. Is it not a fact that when the wind is blowing from the sea, the windward coast of Hawaii is very rough?

A. Sometimes it is, and sometimes it is not rough.

Q. I mean doesn't the weather get calm when the wind is blowing from the land or when there is no wind at all?

A. No, sometimes when the wind is from the sea, it is calm, and when it is from the mountains, it is just the same, calm.

The COURT (To Mr. STANLEY).—Will you explain to the Court what the roughness or the smoothness had to do with this injury?

(Testimony of Bob Samoa.)

Mr. STANLEY.—On account of the rough weather, we claim the boat was raised up and struck the sugar, producing the injury, and not that the sugar was lowered as claimed by the libelant.

The COURT.—If the defendant is liable, he is liable for something that was done or permitted to be done. I don't see that the fact that the wind was blowing from the sea or not, had anything to do with the case, unless it had some effect upon the winchman. As the matter is before the Court, it is the duty of the Court to inquire what the facts are. The Court will not hold anybody responsible for what they did not do.

Q. What was your position in this boat?

A. One of the crew of the boat.

Q. Were you one of the oarsmen, steersman or what?

A. I was one of the oarsmen on that boat.

Q. At the time this accident happened to Palapala, were you an oarsman on that boat?

A. I was not.

Q. What were you doing?

A. I and Palapala were the ones to receive the sugar.

The COURT.—You were to receive the sugar when it came down in the sling? A. Yes.

Q. You mean when it came down where you could reach it? A. Yes.

Q. I mean it was over your heads when you held up your hands to receive it?

A. Yes, when it is time for us to get hold of it, when the sling is being lowered, then we set it in place.

(Testimony of Bob Samoa.)

The COURT.—I ask you whether the sling came down so fast that you could not take hold of it and regulate its fall? A. It did.

The COURT.—Why?

A. In the first place, we didn't know the winchman was going to lower the sugar, as we didn't give him the signal. In the second place, it came so quickly we didn't know it was coming.

Q. I understand you did not know it was coming until it struck Palapala? A. Yes.

The COURT.—It came down very fast?

A. Yes.

The COURT.—And you didn't see it coming down until it struck Palapala?

A. We did not know it until Palapala was struck.

Q. On which side of the boat were you?

A. I was in the middle of the boat.

Q. Where was Palapala?

A. Back with me toward the stern.

Q. Toward which side of the boat, right side or left side? A. He was in the middle of the boat.

Q. Had you any sugar in the boat at that time?

A. We had a sling load of sugar in the boat at that time.

Q. Which side of the boat was that?

A. On the left side of the boat.

Q. The side farthest from land? A. Yes.

Q. Just prior to Palapala being struck, what were you doing?

(Testimony of Bob Samoa.)

A. We were trying to get the canvas from under the first sling load of sugar and we were looking at that.

Q. Was your position—were you bending down looking at the canvas in such a way that you could not see the sugar when it came down?

A. No, we were standing upright then, trying to pull the canvas out from under the first sling load of sugar when Palapala was struck.

Q. About how far apart were you?

A. I was as where I am sitting and Palapala as where the bottle of ink is (indicating thereby the distance between the witness' chair and a point on the clerk's table, a distance of possibly six or eight feet.—Rep.).

Q. How was it you didn't see the sling load until it struck Palapala? A. I was busy at my work.

Q. What do you mean by saying a few minutes ago that you were standing up and pulling at this canvas?

A. I was standing up, but the work is down, so I had to look down.

Q. Palapala and you were engaged at the same work at that time? A. Yes.

Q. Where did it strike Palapala?

A. Right on the chest.

Q. Did you indicate the left breast?

A. I don't know whether it was his right breast or his left breast, it was on his chest.

Q. Can you say what was the effect of it on Palapala?

A. He fell down and laid there like a dead man.

Q. Fell where? A. In the boat.

(Testimony of Bob Samoa.)

Q. In the bottom of the boat? A. Yes.

Q. Face down or up? A. Sidewise.

Q. Did he fall upon his back or his face?

A. He laid sidewise but his face down.

Q. Did this sugar stay on him for any length of time?

A. When this sling load of sugar struck him he was knocked down and the sling load was hoisted up again.

Q. Who ordered it hoisted up, if anybody?

A. Nobody ordered the sling load of sugar hoisted up again.

The COURT.—By the winchman of course.

A. Yes.

The COURT.—You say nobody ordered him to do it?

A. No one.

Q. You say before the accident happened, before the winchman let the sugar come down, this sling load is suspended over the boat, is that so?

A. It was hanging over the boat there.

The COURT.—How far up?

A. About fifteen or twenty feet above the sea.

Q. Do you know what the height of that wharf was above the water? A. I don't know.

Q. Can you state how high?

A. About fifteen or twenty feet.

Q. While this load was so suspended was not the boat shifting too?

A. It was not, it was quite still, it was steady.

Q. If the boat was steady, why was not the signal given to let the sugar come down?

(Testimony of Bob Samoa.)

A. We could not give any orders because the canvas was under the first sling load of sugar. We had to get that out before we could receive another one.

Q. Was that the only reason the order was not given to let the sugar come down?

A. Yes, the only reason.

Q. How many sling loads were taken in each boat during that day from the wharf to the steamer?

A. At the time he met with this accident, we only took one sling load.

Q. I mean throughout the day?

A. Three or four sometimes, on one trip of the boat from the wharf to the steamer.

Here ends the testimony of Bob Samoa, alias Toka.

Whereupon KIA, a witness on behalf of the libelant, was called, sworn, and testified as follows:

Direct Examination,

(By Mr. DUNNE.)

Q. What is your name? A. Kia.

Q. What is your occupation?

A. I am a sailor.

Q. Do you know the steamship "Helene"?

A. I do.

Q. Recently were you employed on that vessel?

A. Yes.

Q. In what capacity? A. As boat steerer.

Q. Do you know Sam Palapala, the libelant here?

A. I do.

(Testimony of Kia.)

Q. Was he employed on that steamship and if so in what capacity?

A. He was one of the oarsmen on that steamer.

Q. Do you know of your own knowledge what wages he received as seaman on that ship?

A. I know that he received seven and one-half dollars a week.

Q. Were you in the boat at the time he was injured at Paauhau, Island of Hawaii? A. Yes.

Q. I wish without any questions from me you would go on and describe that occurrence.

A. I am the boatsteerer on the boat. The crew of the boat had to take orders from me. We went up there to receive sugar, to the wharf. We received the first sling load of sugar alright, the second sling load of sugar was lowered down by the winchman without any notification from me or any of the crew of the boat, very fast.

Q. What happened, did it strike anybody?

A. Sam Palapala was hurt.

Q. Did you use any other name? A. Keau.

Q. What do you mean by Keau?

A. That is another name of Sam Palapala.

The COURT.—Is that the man (indicating the libelant)? A. Yes.

Q. Do you know and if so please state where, if anywhere, the libelant here, Sam Palapala was struck by that descending sugar? A. Right breast.

Q. What part of the body?

A. Right on the breast here (indicating).

(Testimony of Kia.)

Q. How many bags of sugar were in the sling load that struck Palapala? A. Ten bags.

Q. What was the weight of each of those bags?

A. One hundred fifty pounds each.

Q. Just before this accident happened state if you know, what the physical condition of Sam Palapala was?

Mr. STANLEY.—We make the same objection to save our right and take the same ruling as before.

(Objection overruled and exception noted by the defendant.)

A. His physical condition at the time he couldn't do anything.

Q. I am not referring to the time he got struck but before he was struck at all.

A. The same answer as I gave.

Q. At the time he left the steam vessel to get sugar to go, the time before you got to the wharf at all, while passing from the steamer to the wharf, at that time what was the physical condition of the libelant, if you know?

A. Good physical condition.

Q. After he got struck, as you have related, what was done with Palapala?

A. After he got struck he fell down and Bob jumped down to help him and put him in a better place. He could not get up at all, he was helpless.

Q. Did you take him anywhere?

A. We took him on board the steamer.

Q. How did you get him on board the steamer?

(Testimony of Kia.)

A. He was put in a sling and hoisted on board the steamer.

Q. Are you able to give us any estimate, if you know exactly say so, if not, give us your best estimate as to the height of the dock or wharf above the sea level.

A. I cannot say very positively but I think it was between fifteen and twenty feet above the sea.

Q. When the boat was in there alongside the dock or wharf was it made fast in any way to the wharf?

A. No.

Q. How did you keep the boat in position alongside the wharf?

A. There were two of the crew who attended to the oars, they were oarsmen—that is, it was their duty to hold the boat away from the wharf.

Q. Do you remember what Sam Palapala was doing just before the winchman dropped the sugar?

A. He was trying to get that canvas out so as to cover one side of the boat so the sugar would not get wet.

Q. What is the purpose of that canvas, what purpose is it intended to serve?

A. So the sugar won't get wet.

Q. In transferring the sugar from the wharf to the steam vessel, do you endeavor to keep the sugar dry?

A. We do.

Cross-Examination.

(By Mr. STANLEY.)

Q. How long have you been employed on the "Helene"?

(Testimony of Kia.)

A. I think somewhere around five years.

Q. What danger was there of the sugar getting wet by your transferring it from the wharf to the steamer?

A. The company would lose by it.

The COURT.—What was the danger?

A. The danger of being wet by the seawater.

Q. You mean the waves going over the boat?

A. Yes.

Q. About what time was it this accident occurred?

A. In the afternoon.

The COURT.—What time in the afternoon?

A. I think between one and two o'clock.

Q. Was this the first trip you made after dinner?

A. Yes.

Q. What time do you take dinner?

A. Half-past eleven o'clock.

Q. If you take dinner at half-past eleven o'clock, and you state this occurred the first trip after lunch, how do you place the time as between one and two o'clock?

A. Well we have to wait until it is calm enough for the boats to go up to the wharf.

Q. You mean you leave the steamer, then you have to wait for some time before you get a favorable opportunity to go to the wharf? A. Yes.

Q. Sometimes it happens, does it not, when you get under the wharf, that the sea will come in quickly, and you have to row out again and then come back again?

(Testimony of Kia.)

The COURT.—What has this to do with this case, unless you give some reason the Court will not allow it. If you state whether it cuts any figure or not, you can then go on.

Mr. STANLEY.—The weather was rough, it was most important.

The COURT.—Would that influence the winchman?

Mr. STANLEY.—We deny his having let the sugar down, but that the sea, the weather was so rough that the boat was carried up by a wave and the man came in contact with the sugar hanging there, and thereby was hurt.

The COURT.—If you want to prove any material fact, I have no objection.

Mr. STANLEY.—I did not go into the weather.

The COURT.—I understand you claim it to be the fact that the weather was rough, that the waves were rolling high, and that influenced the boat to go up and strike the sugar.

Q. Well go on.

A. Well when I see a big wave coming in I give orders to the crew to row the boat out, and then come back.

The COURT.—Was this man injured by a reasonably big wave coming in? A. He was not.

The COURT.—How was he injured?

A. He got injured on account of the winchman low-

(Testimony of Kia.)

ering that sling load of sugar without any notification from the people in the boat.

Q. What was the condition of the weather on that day as to wind and sea?

A. It was calm so we could work.

Q. You mean it was calm all day?

A. It was quite calm in the afternoon. We had to watch for our chances.

Q. What do you mean by having to watch for your chances?

A. Well we had to see when the sea was calm, that is the time for us to go in.

Q. During the afternoon it would be rough at times and calm at times, and you would take advantage of the calm moments to rush in? A. Yes.

Q. There were times during that afternoon that it was so rough that you could not work?

A. No, we could work that afternoon.

Q. What do you mean by saying that during that afternoon you had to watch for your chances?

A. We watched for our chances because sometimes there were other boats at the landing and we watched for them. When they came out we came in.

The COURT.—You watched for your chances with reference to the waves or something else, let us find out?

A. Yes, we wait for our chances. We wait until one boat is loaded, and when that boat came out, our boat came in. Not in reference to the waves.

(Testimony of Kia.)

The COURT.—So that no time that afternoon the storm or the waves interferred with the loading of sugar? A. No.

The COURT.—Neither the wind nor the waves?

A. No.

Q. Was there no wind at all that afternoon?

A. There was some wind.

Q. From which direction was it blowing?

A. From the land.

Q. How had the waves been in the morning, rough or calm, big waves or small waves?

A. In the morning, high seas, high waves.

Q. Would you say it was very rough?

A. It was very rough.

Q. About what time did it calm down?

A. I think it was after twelve o'clock.

Q. Sometime after your lunch? A. Yes.

Q. How many bags were you taking off at a time in the boat that afternoon?

A. Two or four sling loads at a time.

Q. Sometimes you took off two sling loads at a trip and sometimes four, that afternoon? A. Yes.

Q. Is it not a fact that when the weather is rough you can only take off two sling loads at a trip?

A. When it is rough, two or three sling loads.

Q. And when it is calm?

A. Four to five sling loads when it is calm.

(Testimony of Kia.)

Q. Where in the boat was Palapala just before this sugar struck him?

A. He was on the side next to the landing, in the boat on the right side, working on this canvas.

Q. Stooping down trying to get this canvas from under the sling? A. Yes.

Q. It was while he was engaged in that work, as you have described, that the sugar struck him?

A. Yes.

Q. When the sugar struck him what effect had it on him? A. He was hurt.

Q. Did he still continue standing?

A. No, he fell into the boat.

Q. Is it not a fact that when the sugar struck him that he fell first of all into the side of the boat, that he was standing or lying back against the edge of the boat?

A. Yes, he was struck and jammed up against the side of the boat and then fell into the boat.

Q. What assistance did you lend Palapala, if any?

A. I did not give any hand to help him at all, it was Bob.

Q. Why didn't you go to help him?

A. I was steering the boat.

Q. You had to look after the boat? A. Yes.

Q. It was not calm enough to help this man that was lying down, as you say, helpless?

A. It was calm enough to give him our hand, but the boat would be shifting here and there.

(Testimony of Kia.)

Q. If you had not attended to the boat it would have been dashed upon the rocks, would it not?

A. I think it would.

Q. You say Palapala was hoisted up on the steamer, do you know how long he remained there?

A. No, I don't know.

Q. Did you see him come off the steamer that afternoon? A. I did.

Q. About how long was he on the steamer.

A. When we got aboard the steamer and hoisted him up, the captain told us to come ashore and get the box to put the man in.

The COURT.—Did they have a dead man aboard?

Q. You mean one of the ordinary boxes that passengers are landed in? A. Yes.

Q. Palapala was compelled to get over the boat into that box, was he not?

A. There were two others in the box, some one had to hold him.

Q. Yes, but he was able to assist himself?

A. No he was not able.

Q. Don't you know as a matter of fact, that when Palapala boarded the steamer, after he was hoisted up that he walked around on deck to the captain's cabin to get his shoulder dressed?

A. I cannot say as to that, I don't know.

Q. Did I understand you to say that you did not see the sugar descend until it actually struck Palapala?

(Testimony of Kia.)

A. No.

Q. Is that right? A. Yes, it is.

Q. You were sitting in the back of the boat facing the sling load?

A. I was facing forward looking at the two oarsmen.

Q. The sling load came between you and the tow of the boat? A. Yes.

(By The COURT.)

Q. Are you sure that no notice was given by the winchman before lowering the sling when he did?

A. There were no such instructions.

Q. From anybody in the boat?

A. From nobody in the boat.

Q. How fast did it come down; did it come so fast that the men in the boat could not regulate it or stop it?

A. It did.

Q. Where was the winch located, on the wharf?

A. No, it was above the wharf.

Q. On the land? A. Yes.

Q. Who handled the winch?

A. A Portuguese.

Q. By whom was he employed?

A. Paauhau Company.

Q. The Plantation? A. Yes.

Q. Did the man on the ship have any control whatever of the way of landing sugar in the boat?

A. No control whatever.

(Testimony of Kia.)

(By Mr. STANLEY.—Resuming the Cross-Examination.)

Q. Is it not a fact that there are two men stationed in the boat whose duty it is to receive the sugar as soon as it comes close enough to them to guide it or trim it to the proper position in the bottom of the boat?

A. Yes.

Q. The winchman is assisted by them in putting the load in the proper place in the boat? A. Yes.

The COURT.—Did it come down so fast that these men could not stop it or handle it?

A. Yes.

Redirect Examination.

(By Mr. DUNNE.)

Q. As the sugar struck Palapala, what became of it?

A. It was hoisted up again.

Q. Who hoisted it? A. By the winchman.

Q. Did anybody in the boat give him an order to hoist that sugar?

A. No instructions from any one in the boat.

Here ends the testimony of Kia.

Whereupon MAKAIO, a witness on behalf of the libelant, was called, sworn, and testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. What is your name? A. Makaio.

Q. What is your occupation? A. Sailor.

(Testimony of Makais.)

Q. On what vessel are you employed?

A. Steamship "Helene."

Q. Do you know a place called Paauhau on the Island of Hawaii? A. I do.

Q. Do you know the wharf there? A. Yes.

Q. Did you recently make any measurement as to the height of that wharf above the sea level?

A. I have with a rope.

Q. How long ago was it that you made those measurements? A. I have forgotten.

Q. About when? A. In the month of March.

Q. Was it before or after Samuel Palapala got hurt?

A. It was after Sampel Palapala got hurt.

Q. What was the height of the wharf above the sea level? A. Quite high.

Q. How many feet?

A. When I measured it the wharf was 22½ feet above the sea level.

Q. Were you assisted by any person in making this measurement?

A. I was.

Q. Who?

A. A Japanese that works on that wharf.

Cross-Examination.

(By Mr. STANLEY.)

Q. What is his name?

A. I have forgotten his name.

(Testimony of Makais.)

Q. What was your purpose in measuring the height of this wharf?

A. I have measured because I have heard others talk about the height and I wanted to find out for myself.

Q. It had nothing to do with this case?

A. I measured it in regard to this case.

Q. What kind of day was it when you measured it; fine day, good weather or bad weather?

A. It was quite rough the day when I took this measurement.

Q. High water or low water?

A. I cannot say whether it was high tide or low tide.

Q. I understand it was exactly 22½ feet?

A. Yes.

Q. Is not the wharf higher in some places than in others?

A. No, well—at the point where the rocks are it is very high, but where the boat is supposed to land, that is where I measured it.

Q. Can you give us the day of the month of the measurement?

A. I have forgotten the day of the month I went there to make this measurement.

Q. What day of the week was it?

A. I have also forgotten that.

Q. You say you have forgotten whether it was high tide or low tide, what day of the week, what day of the month and what the name of the Japanese was who assisted you in this measurement?

(Testimony of Makais.)

A. I don't recollect whether it was high tide or low tide or the name of the Japanese, and the dates I don't remember.

Q. Is it not a fact that this wharf is solid masonry and that at the foot of the masonry is a lot of rocks stretching into the sea some distance, and that the only thing you could measure standing on the landing, is the height of the masonry?

A. It is true it is masonry work and that there are rocks where the boat is supposed to land. That is where this masonry work is done, that is where the boat is supposed to be.

Q. The boat is supposed to go right up to the masonry? A. Yes, close to the masonry.

Q. You don't know what position the boat was in, in regard to the wharf, when Palapala got hurt?

A. No, I don't.

Here ends the testimony of Makaio.

Whereupon SAMUEL PALAPALA, the libelant herein, was called, sworn and testified in his own behalf as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. What is your name? A. Sam Palápala.

Q. What is your occupation? A. Sailor.

Q. How old are you? A. Over twenty years.

Q. Are you married or unmarried?

A. Unmarried.

Q. Where were you born? A. Puna.

(Testimony of Samuel Palapala.)

Q. Is that in this Territory of Hawaii?

A. Yes, in Hawaii.

Q. When you say Hawaii you mean the Island of Hawaii? A. Yes.

Q. Where have you lived all your life?

A. I was born in Hawaii, then I went to Maui, and from there here. I have been in Honolulu six years, I think.

Q. Have you ever gone abroad to any foreign country during your life? A. Never have.

Q. Do you know the steamship "Helene"?

A. I do.

Q. Were you employed upon her?

A. I have been.

Q. In what capacity?

A. As crew on the boat.

Q. What wages did you receive as mariner in the ship?

A. Seven dollars and a half a week.

Q. At the time of the occurrence of this accident, did you have any other source of income, except wages as sailor? A. No other.

Q. Is your father living or dead? A. Living.

Q. How is he supported?

A. I took my father down to Joe Fern, and introduced him, and told Joe Fern if my father came down here—

The COURT.—You can't state what Joe Fern said.

A. I went and introduced my father to Joe Fern, and told him to give him money, each and every week.

(Testimony of Samuel Palapala.)

The COURT.—You need not answer the question, if he supports him let him say so.

Q. Is your father supported by you?

A. I am supporting him.

Q. To what extent do you contribute to his support, out of your wages?

A. Two dollars, sometimes three dollars a week.

Q. This Joe Fern you speak of as introducing your father to, and as having certain instructions to, and whom you have testified about, who is he?

A. He is the man that selects men for the Wilder Steamship Company.

Q. At the time of the accident referred to, what was your physical condition—just prior to the accident?

A. Good strong physical condition.

Q. During your entire life, have you had occasion to visit a physician professionally?

A. I have been to a physician two or three times; once on Maui I went to see Dr. Herbert to be vaccinated, and another time I went to see Dr. Herbert to have a tooth extracted.

Q. Aside from these occasions, have you ever been compelled, by any physical ailment, to visit a doctor outside of this accident?

A. None outside this accident.

Q. At the time of this occurrence, were you in the boat? A. I was.

Q. How did you come to be in the boat?

A. I was one of the crew of the boat.

(Testimony of Samuel Palapala.)

Q. Where was the boat going?

A. Going to the wharf to recieve sugar.

Q. Where was the steam vessel at that time?

A. The steamship was fifty to a hundred yards from the wharf.

Q. Who were in the boat with you, at the time you went in for sugar?

A. Myself, Bob, Kewiki, Hina and Kia.

The COURT.—That is five? A. Yes.

Q. In order to explain the thing a little more, I will ask you, if there is any distinction between the name David and the name Kewiki?

A. No it is the same thing.

Q. This is the same name?

A. It is meant for the same name.

Q. About as close as you can judge, about how long was this boat, from which you went in from the steam vessel, to the wharf to get this sugar—the small boat?

A. I am not sure, but I think about twenty-five feet long.

Q. Of what pattern is it, how is it built?

A. It is one of these freight boats.

Q. What I want to get at is what the shape was with reference to its two ends.

A. The bow and stern is alike.

Q. Is it the whale boat pattern? A. Yes.

Q. Sharp at both ends? A. Yes.

Q. When the boat got in alongside the wharf what,

(Testimony of Samuel Palapala.)

if any thing, was done in reference to making the boat fast to the wharf if any such thing was done

A. We did not make fast to the wharf because when we got alongside the wharf there were two oarsmen supposed to keep the boat away from the wharf all the time.

Q. You said your age was over twenty years, how much over twenty years?

A. I think in the month of July I will be twenty-one.

Q. July, 1903. A. Yes.

Q. When the boat got in alongside the wharf did you receive any sugar from the wharf?

A. When we got up to the wharf we received the first sling load of sugar.

Q. When that sling load was received in the boat what was the next thing that you did?

A. The next thing that I did was to try to get the canvas with the first sling load of sugar, with the assistance of Bob, so as to get enough canvas to prevent the sugar from being wet.

Q. While you were doing that what happened?

A. While I was fixing this I was stooping down when I stood up with this canvas that was the time I was struck with this sling load of sugar.

Q. Where were you struck?

A. Right in front here (indicating chest).

Q. Just before you got struck by that sling load of sugar where, if you know, was that sling load of sugar that struck you?

A. It was suspended over halfway?

(Testimony of Samuel Palapala.)

Q. How was it held there?

A. It was held by the winchman.

Q. Did anybody in the boat have anything to do directly or indirectly, approximately or remotely, with holding that sling load of sugar in position?

(Question objected to by defendant on the ground that it was not a question of fact but a question of opinion.)

The COURT.—That is a fair question.

(Question withdrawn.)

Q. While that sugar was suspended over and above that boat, did any body in that boat directly or indirectly, approximately or remotely, do anything to or with that sugar? A. No.

Q. While that sugar was suspended there was anything said and if so, what, by any person in that boat to that winchman? A. No one.

Q. When that sling load of sugar descended describe its rapidity, I want the rapidity of its descent.

A. That sling load of sugar was lowered half way while I was tending to the canvas. This sling load of sugar was lowered so fast that I didn't have time to get out of the way.

Q. Do you remember how many bags were in that sling load? A. Ten bags.

Q. Do you know what the average weight of such bags of sugar was?

A. I don't know of my own knowledge. I have heard the Japanese at Paauhau Plantation—

(Testimony of Samuel Palapala.)

(The defense moved to strike out the answer on the ground that it was not testimony. Motion granted.)

Q. After you were struck with this sugar then what happened?

A. First I want to show the position I was in before I fell in that boat.

Mr. DUNNE. (To the Interpreter).—Tell him to answer the questions directly.

Q. After this sling load struck you in the manner you have described what was the next thing happened that you remember of?

A. When I was struck by the sling load of sugar I was jammed up against the boat, then I fell into the boat. I didn't know I fell into the boat. After that—

Q. Why was it you didn't know you had fallen into the boat?

A. I was senseless, I was like a dead man.

Q. Where were you when you came to?

A. I was on the steamer.

Q. Do you remember anything that occurred after the time you were struck—the time you were struck as you have described from the time you found yourself on the steamer? A. Yes.

Q. I mean the time you got struck with the sugar in the boat from the time you reached the steamer, during the period, do you remember anything then?

A. No.

Q. Now what was the effect, what did this blow do

(Testimony of Samuel Palapala.)

to you? What was the effect of this blow upon your body? A. I was hurt.

Q. In what way?

A. I suppose because this sling load of sugar landed on my chest, I felt as if I was out of breath.

Q. What did it do to you—break any of your bones? What did it do to you?

A. Well, I didn't know at the time until I was taken aboard the steamer. I was taken to the captain's room to be dressed.

Q. They said one of your bones were broken?

The COURT.—He knows whether one of his bones was broken or not.

A. At the time the captain told me I didn't know. My feeling at that time was that I had fallen.

Q. Was one of your bones broken? A. Yes.

Q. What bone? A. Collar bone.

Q. What, if anything, was the effect of this blow upon you? Pain you in any way? Physical pain?

A. Well, when I was brought back to Honolulu I was taken to the Queen's Hospital. The collar-bone had been paining me and I had pains in the shoulder. This does not pain me all the time; some days I am all right and sometimes it pains me off and on.

Q. When you first got hurt did you experience any pain?

(Question objected to as leading.)

(Testimony of Samuel Palapala.)

The COURT.—The largest latitude will be allowed, the object being to tell what was the matter. The question is leading but the Court will allow it.

(The defendant noted an exception to the ruling of the Court.)

A. The time I commenced to feel the pain was when I was taken to the captain's room to board the steamer.

Q. Will you describe that pain?

A. The captain told me you had better go to Paauhau Plantation Hospital. I did feel the pain at that time.

The COURT.—Strike out what the captain said.

The COURT.—How long were you in Queen's Hospital?

A. I think I have been there a month and two weeks.

Q. When were you discharged from Queen's Hospital?

A. Yesterday.

The COURT.—Who was your physician at the Queen's Hospital?

A. I had three doctors. The first doctor was Dr. Sinclair. The second Dr. Wilson, the third I think is the head doctor. I don't remember his name.

Q. Was it Dr. Cofer?

A. Yes, that is the doctor.

Q. This pain you say you felt when you went to the captain's room on board the ship, did that pain affect you in any other way? A. It did not.

(The Court here ordered a recess until 1:30 P. M. today.)

(Testimony of Samuel Palapala.)

Upon reconvening at 1:30 o'clock P. M., the direct examination of Palapala was resumed.

(By Mr. DUNNE.)

Q. What other effect, if any, did this pain you speak of in your shoulder—what other effect did it have upon you? A. My body all over was in pain.

Q. How was it at night?

A. At night-time it pained me so that I could not sleep.

The COURT.—Not now?

A. No, not at the present time but I still have pain in my shoulder.

The COURT.—Right after the injury did it pain you at night?

A. Yes.

Q. How long after you arrived at the Queen's Hospital did these pains continue?

A. About three weeks after I arrived at the hospital my pain kind of eased off—pain in the collar bone.

Q. Then after that time you experienced no other pain?.

A. I have had pain in my shoulder, not continual pain but at times, off and on.

Q. How long after the first pain was it when the second pain started in your shoulder?

A. I think a week after the pain went away from the broken collar bone that pain appeared in my shoulder.

Q. So that as I understand the situation, the first

(Testimony of Samuel Palapala.)

pain was the pain of the collar bone fracture, and the second pain which came after the first pain eased off, was in the shoulder

A. Yes, the first pain in the broken collar-bone, the second was here in the shoulder.

Q. You say the second pain you experienced, that it was off and on. That was off and on. What do you mean by that?

A. Sometimes when walking in the streets and shifting my hand—that is back and forward, and times when I jerked it was the time the pain started. Sometimes it would pain all day and all night and the next day and then the pain will leave me.

Q. So that at the times the movements of the arm will start this pain?

A. When I walk in the streets I cannot swing my hand, I have to hold it up in this position (indicating a position of right angles to his body). If I swing it in the streets it starts to pain me.

Q. Now I want to ask you whether in this injury you received, did you experience any pain other than in the body?

The Court.—Other than his body? In whose body would it be? You should ask him if he experienced any mental pain.

(The defense objected to the question of the Court.)

The COURT.—The Court has looked up to law and I am satisfied that the discretion of the Court will allow

(Testimony of Samuel Palapala.)

either side to ask leading questions in order to elucidate the facts.

(The defendant noted an exception to the ruling of the Court.)

Q. Did you suffer any mental pain?

A. Yes, I suffered mentally about my broken bone not being well. If it don't get well I don't know how I can make a living.

The COURT.—Are you a working man, are you working now? A. No.

Q. Have you earned anything whatever since this accident occurred?

A. Well, I haven't received anything only when Joe came up to pay off some of the men. He came over to me and gave me some money. He gave me five dollars.

The COURT.—Who is he?

A. He is the man who selects men for us.

The COURT.—For the ship? A. Yes, sir.

The COURT.—Not for the Plantation?

A. No.

The COURT.—That is the paymaster of the ship?

A. Yes.

Q. That five dollars, what was that? Was that wages or what?

Mr. STANLEY.—We object to his asking if it was wages or not.

(Objection overruled and exception noted by the Defendant.)

(Testimony of Samuel Palapala.)

A. I don't know for what reason he gave me the five dollars. All I know is, he called me and gave me this five dollars.

The COURT. (To the Interpreter.)—Has he received and other money?

A. This is the first time he handed me five dollars. He came up the second time and I think he handed me three dollars and twenty-five cents.

The COURT.—Then he handed you money twice, five dollars and three dollars and twenty-five cents, that is eight dollars and twenty-five cents? A. Yes.

Q. Did you ever get any other money?

A. Yes.

Q. When was it, about?

A. I think it was last Friday when I went down to the wharf. Joe told me if I wanted money to come to the Wilder Steamship Company's office.

Q. Did you go there? A. Yes.

Q. Did you get any money?

A. Before I went up to the Wilder Steamship Company I asked Joe who to go to and he said Charlie Rose.

Q. Did you go there? A. I did.

Q. Did you get any money?

A. I received money. Charles Rose gave me five dollars.

The COURT.—In the offices of the Wilder Steamship Company? A. Yes.

(Testimony of Samuel Palapala.)

Q. Have you received any other money from any other source since you have been injured?

A. No other.

Q. This was all? A. Yes.

Q. Now then in the first place take the first five dollars from Joe Fern, what was that for?

A. I don't know, I can't understand it.

Q. What was the three dollars and twenty-five cents for?

A. It was the same thing. He gave me the money and did not say anything.

Q. What was the $5.00 from Charles Rose for?

A. That is the same thing.

Q. During the time when you received this money—this princely sum of $13.25, where were you living?

A. Living at the hospital.

Q. Were you doing any work at the time you received this money, at your occupation as seaman?

The COURT. (To Mr. DUNNE.)—The hospital is supported by the United States, is it not?

Mr. DUNNE.—The marine end of it, yes, sir.

A. I was not doing any work.

The COURT.—As a sailor or otherwise?

A. No.

Q. Are you able to lift objects or articles now?

A. I cannot do it.

The COURT.—Or work at your business?

A. I cannot.

(Testimony of Samuel Palapala.)

Q. How long after the accident was it that you went to the Queen's Hospital?

A. It was only a week after I met with the accident when I was taken to the hospital here.

Q. How did you come to go to the Queen's Hospital?

A. The captain of the steamer at Hamakua telephoned me to come to Paauhau landing to go to Honolulu. After I got aboard the steamer the captain told me to come to Honolulu and to go straight to the Queen's Hospital.

The COURT.—That is how you came to go there?

A. Yes, that is what he told me at Paauchau. When I arrived at the wharf in the harbor here I went to consult Joe Fern, and Joe Fern went over to the Marine Hospital and got a certificate for me to go up to the hospital with.

Q. When this sling load of sugar descended, at what rate of speed did it descend, if you know?

A. It came down so fast nobody could handle it to set it in place where it was wanted to be put in the boat.

Cross-Examination.

(By Mr. STANLEY.)

Q. Where were you educated? A. Maui.

Q. Anywhere else?

A. No, I went to school in Maui only. The Catholic School at Wailuku.

Q. How long were you there?

(Testimony of Samuel Palapala.)

A. Six or seven years.

Q. You can speak English, can you not?

A. Well, I speak a little. I understand some and I cannot understand some.

Q. You were at an English school for six or seven years, this Catholic school? A. Yes.

Mr. STANLEY.—I suggest that if he can converse in English we can get along quicker.

The COURT.—Try it?

Q. Where did you live in Honolulu, prior to this accident? A. I lived on the steamer.

Q. Did you stay aboard the steamer when in port, in the harbor? A. Yes.

Q. You did not live in town?

A. I did not live in town, but I was home sometimes at night.

Q. Have you brothers or sisters?

A. No sisters, but brothers.

Q. How many brothers have you?

A. I think five living now.

The COURT.—Then you have four brothers?

A. Yes.

Q. Five including yourself? A. Yes.

Q. Are they older or younger than you?

A. Three older than I, one is not quite as old as I.

Q. Where are they working?

A. One of them is working on Wailuku Plantation, another up in Manoa some where.

(Testimony of Samuel Palapala.)

Q. What is he doing there?

A. I don't know what he is doing, I never saw him around there.

Q. The third? A. One is up Hilo.

Q. What is he doing there?

A. He is living up there. I heard he had gone up to Puna.

Q. Is he working? A. I don't know.

Q. What is your younger brother doing?

A. Also at Kihei?

Q. Is he working at Kihei?

A. I don't know whether he is working there or some other place in Maui. I heard he was living at Kihei but I don't know whether he is working there or not.

Q. How old is your oldest brother?

A. Eighteen years.

Q. The oldest?

A. I believe about twenty-seven years.

Q. The next one?

A. The next one is twenty-five years, there is two years between them.

Q. What is your oldest brother doing at Waiiuku?

A. He is running a train for the plantation.

Q. Locomotive? A. Locomotive.

Q. You don't know what your brother at Hilo is doing? A. No, sir.

Q. They are all well? A. Yes, they are.

Q. Where does your father live?

A. He lives up Kalihi.

(Testimony of Samuel Palapala.)

Q. How long have you been working on the "Helene"? A. Over a year.

Q. What were your duties on the "Helene"?

A. Sailor.

Q. What were some of your duties?

A. One of the boat's crew.

Q. When you were not on the boat what were you doing? Helping keep watch, assisting in keeping watch were you not? A. Yes?

Q. Scrubbing the decks? A. Yes.

Q. Polishing brass works? A. Yes.

Q. Taking a turn at the wheel? A. No, sir.

Q. What time of day did this accident happen to you? A. Sometime in the afternoon.

Q. About what time? If you know say so, if not, you need not.

A. I believe between one and two o'clock.

Q. You say you have never been injured before?

A. No.

Q. Nothing wrong except teeth and you have been vaccinated once? A. Yes.

Q. On the occasion of this accident what position did you have in the boat? Where in the boat were you?

A. Right about the boat steerer.

Q. On which side of the boat?

A. In the center of the boat.

Q. Just prior to this accident what were you doing?

A. I was fixing the canvas that was under the first

(Testimony of Samuel Palapala.)

sling in the boat. I was trying to put it so as to prevent the water from the sea getting to the sugar, to prevent its being wet.

Q. You wanted to put the tarpaulin or canvas so that the waves would not wash in and wet it?

A. Yes.

Q. How many sling loads of sugar were in the boat before the accident? A. Just one.

Q. You are sure about that?

A. One before the sling that come down and struck me.

Q. Which side of the boat was that sling load lying?

A. Left side.

Q. The side farthest from the landing?

A. Yes, sir.

Q. Do I understand you that you did not see the sling load that hurt you until it actually struck you?

A. I seen the sling load lowered halfway—lowered by the winchman halfway.

Q. After that you didn't see it again moving until it actually struck you? A. Yes, sir.

Q. You didn't see it come down to strike you?

A. I didn't see it because I was fixing up the canvas when I was stooping down. When I stood up the sling-load struck me on the breast.

Q. Across the breast?

A. Right about here (indicating the upper part of the breast).

(Testimony of Samuel Palapala.)

Q. You say you were stooping down at that time?

A. I was stooping down fixing the canvas to put it to the side of the boat. When I stood up the sling load struck me.

Q. What about putting it to the side of the boat?

A. The tarpaulin. I was trying to pull the tarpaulin from under the first sling and put in more on the side of the boat so as to cover the sling of sugar.

Q. Had you taken the tarpaulin out from under the first sling? A. I had just pulled it out.

Q. You had just pulled it out? A. Yes.

Q. You had not gotten it quite out at the time the sugar struck you? A. Yes.

Q. As a matter of fact, does not this tarpaulin lie in the bottom of the boat always under one load of sugar?

A. Halfway in the boat, and half of the tarpaulin at the side of the boat.

Q. Suppose this was the bottom of the boat (indicating); it lays in the bottom of the boat with half of it free, so it can be bent over the sugar?

A. One-half is more than the part in the boat.

Q. When the first sling load comes it is put on the tarpaulin? A. Yes.

Q. So that part is in the bottom of the boat ready to receive the second sling load?

(Counsel for the libelant here suggested to the Court that if the witnes did not understand, he could avail himself of the services of the interpreter.)

(Testimony of Samuel Palapala.)

A. No, we carry two canvases; one on the right side, and one on the other side. The object is to have each sling covered by a tarpaulin.

Q. You had through some mistake the second tarpaulin over the first sling road, so that you had to pull it out from under?

A. (Through the Interpreter.) Yes.

Q. And you were engaged in getting the second tarpaulin free from under the first sling load, when the sugar struck you?

A. (Through the Interpreter.) Yes.

Q. How was the boat behaving at that time?

A. (Through the Interpreter.) It was not very steady. It was going forward and backward.

Q. What was making it go forward and backward.

A. (Through the Interpreter.) The waves. When the waves come in it makes the boat go in and come back again.

Q. How close to the shore would the boat be when you receive this sugar?

A. (Through the Interpreter.) I think the boat would be two or three feet from the wharf.

Q. I am not talking of the landing. I am talking of the shore. The landing is considerable space out from the shore?

A. (Through the Interpreter.) I think from where I am sitting, to the end of this table. (Indicating the

(Testimony of Samuel Palapala.)

clerk's desk, a distance of four to twelve feet, depending upon which end the witness referred to.)

Q. You were that close, were you? A. Yes.

The COURT.—How many feet is it? About how many? A. I think ten feet, I think.

Q. There is considerable action there, is there not? Considerable action in the boat while the waves come in and strike the boat and then recede?

A. It cannot because we have two oarsmen to keep the boat steady. When the waves come we have the boys pull ahead.

Q. There would be considerable action in the boat if it were not for these oarsmen, would there not?

A. Yes.

Q. When you see this action of the waves you roll the boat out of the way?

A. Yes, we always try to pull out.

Q. How many boat lengths from the shore are you when you are ready to receive sugar?

A. I cannot say as to boat lengths between us and the shore when we receive sugar, but I think it is from here to the end of the table, and maybe a little further. (Again indicating the distance from the witness' chair to the clerk's desk.)

The COURT.—That is how many feet?

A. I cannot say for sure, it might be ten, twelve or thirteen feet.

(Testimony of Samuel Palapala.)

(After measuring, it was stipulated between counsel that the distance from the witness' chair to the farther end of the clerk's desk was fifteen feet.)

Q. Were you on the previous trip of the "Helene" when the boat was capsized? Were you one of the crew of the boat that was dashed on the rocks and capsized?

(Question objected to on the ground that it was not proper cross-examination, no reference having been made in direct examination, to the matter. Objection sustained.)

Q. What is the effect of the waves upon the boat? What was the effect of the sea coming in?

A. It is backed up.

Q. Any other effect upon the boat?

A. When the waves come in it draws the boat in and the oarsmen row the boat out again.

Q. When a wave is coming in and another is receding from the boat and two waves meet, what is the effect?

The COURT.—I don't think you had better pursue that subject unless you show it has some interest to your suit.

Q. At the point where you stand to receive sugar from the derrick, and a wave from the sea meets one receding from the land, what is the effct?

(Objcted to on the ground that it assumes facts which are not in evidence.)

The COURT.—It is not cross-examination anyway.

Q. Besides being driven backward and forward, has

(Testimony of Samuel Palapala.)

it any effect upon that boat in the way of rising and falling with the waves?

The COURT.—Everybody knows that.

Mr. STANLEY.—Bob Samoa said no.

A. Yes, when the waves come in the boat is lifted up in under the sling, and when the waves come out it drives the boat back.

Q. When the waves are receding, driving the boat back, do they not raise it up again?

A. No, it does not lift the boat up. As soon as the wave is receding the boat goes down.

Q. You stated the first thing you knew about this sling load of sugar was when it struck you?

A. Yes.

Q. Will you describe what effect it had upon you?

The COURT.—Just ask him how it effected him, that is what the question was.

A. I fainted after I was struck.

Q. So you didn't feel anything?

A. No, I didn't know anything after that.

Q. How did you know about where you fell in the boat?

A. I didn't know where I fell in the boat.

Q. As I understood your testimony this morning the first thing you did know was when you were in the captain's stateroom.

(Testimony of Samuel Palapala.)

(Question objected to on the ground that it was not a correct statement of the witness' testimony.)

Q. Your counsel says that first thing you knew was when you approached the steamer. Is that right?

(Objected to on the ground that it was entirely improper cross-examination.)

Q. Do I understand you to say that you did not recover your consciousness until you approached the steamer?

The COURT.—Ask him when he recovered. It is the duty of the Court to protect a witness. I don't think it is fair to the witness.

A. The first time I came to know anything was when we were about alongside the steamer, and they were preparing to put me in the sling. That was the first time I knew what I was about.

Mr. STANLEY. (To the Interpreter).—Tell him that I don't want to be unfair. Tell him to answer the questions deliberately, and take all the time he wants.

Q. How were you taken aboard the steamer?

A. I was put in a sling, the usual sling for sugar purposes. They lowered it down and I sat in the middle and was hoisted aboard.

Q. You were sitting in the sling?

A. They put the line over me and it was hoisted up.

Q. How did you hold on to that sling?

A. I held on with my left hand. They held me in with the rope's end.

(Testimony of Samuel Palapala.)

Q. What treatment did you receive after you came down to Honolulu?

A. The first treatment I had at Paauhau when the doctor at the Plantation bandaged my arm and fixed up the place wherever it was hurt.

Q. At the Plantation Hospital?

A. That was before I came back to Honolulu.

The COURT.—The Plantation doctor did it?

A. Yes.

Q. You remained there until the steamer came down to Honolulu? A. Yes.

Q. What day of the week did the accident happen?

A. Thursday.

Q. You left there on Friday, did you, on the "Kinau"? A. I came back on the "Helene."

The COURT.—What day did you leave there?

A. I think it was Sunday morning.

Q. Between Thursday and Sunday you were in the hospital at Paauhau Plantation? A. Yes.

Q. When you arrived in Honolulu is it not a fact that you were taken in charge of by the Wilder Steamship Company and taken up to the hospital?

A. Yes, it was by Joe, an employee of the steamship company.

Q. He took charge of you?

A. Yes, he was only the one who took me into the doctor's office to receive a certificate of sailors aboard the steamer to be permitted to enter the hospital.

(Testimony of Samuel Palapala.)

Q. The Marine Hospital Office off Fort street?

A. Below Soda Works.

Q. You remained in the hospital until yesterday?

A. Yes, when I was discharged.

Q. Were you put to any expense while staying in the hospital?

The COURT.—You need not answer that. That is fixed by the statutes of the United States. The United States pays for that—all sick and injured at sea.

Mr. STANLEY.—That is satisfactory.

Q. When you went to the Queen's Hospital was this shoulder of yours bandaged up again?

A. Yes, the first bandage was taken off and a new one put on.

Q. How long did you keep the bandage on your arm, the new or old, I don't care, up to what time?

A. I think it was three weeks afterward when they took that bandage off.

Q. Have you done any work with your arm since?

A. I have not done anything since I met with the accident.

Q. You have been keeping the arm in practically the same position that it is in now? A. Yes.

Q. Have you done anything with it at all, carried anything, or anything like that? A. No.

Q. You say you were about three weeks in the Queen's Hospital before you took your arm out of this sling? A. Yes.

(Testimony of Samuel Palapala.)

Q. When did you first feel this other pain you have spoken of?

A. It was after the doctor had taken this bandage off of my arm. It was sometime after that that this pain appeared.

Q. I understand you feel it sometimes whenever you attempt to move your arm.

A. Yes. And sometimes when I move in the night it pains me, especially at night time when I try to turn, that starts the pain.

Q. Whereabouts in your shoulder have you got pain?

A. Right on top, right in here, in the bone here. (Indicating.)

Q. In the top of the arm?

A. Yes, right here.

Q. Right down here over the arm?

A. Above the shoulder and down.

Q. How far above?

A. Just right on the shoulder here (indicating), and down below.

Q. You mean right down over the place where the broken bone is?

A. The place where the broken bone is is a different place from where it is now. The broken place is farther away than where the pain is.

Q. You feel that whenever you swing your arm or turn over at night in your sleep?

A. The only time I feel the pain very much is at

(Testimony of Samuel Palapala.)

night-time when I turn over. It does not hurt so much when I swing my arm.

Q. When you jerk your arm suddenly or turn over at night is when you feel the pain. Have you tried to get any employment? A. Yes.

Q. Since you have left the hospital?

A. I have not.

Q. So that until you do obtain employment you cannot know whether you could do it or not?

A. I don't think I could do any work at present because I don't think I can do anything with my arm.

Q. You have not tried to do anything yet?

A. No.

Q. You didn't understand why the company by which you are employed gave you money while you were sick? Is that right? A. No.

Q. You say the first time you got money from Joe Fern he went to pay some other men in the hospital. Who were these men?

A. Two sailors working for the Wilder Steamship Company. One is named Mano, and the other Alani.

Q. And they got money, too? A. Yes.

Q. They were sick at the time you were there?

A. Yes.

Q. The latest time you received money was last Monday? A. I believe it was Monday of this week.

Q. Do you know as a matter of fact that it is a cus

(Testimony of Samuel Palapala.)

tom of the Wilder Steamship Company to look after their men paying them money when they are laid up?

The COURT.—That is not an issue in this case, the pleadings don't show it, don't show anything about it.

Mr. STANLEY.—I didn't examine him on that point as it had not been brought out in direct examination that he did not understand what the money was for.

The COURT.—It don't seem to me that it has anything to do with the case.

Q. As I understood you, you went down to the wharf and asked Joe Fern where to go if you wanted to get some money? A. Yes.

Q. And he told you to go to his office? And you went there and got your money? A. Yes.

Q. You spoke of Doctors Sinclair, Wilson and Cofer attending you in the hospital? Have you asked them about this second pain in your shoulder you testified to?

A. I have not told them.

Redirect Examination.

(By Mr. DUNNE.)

Q. How was it you did not tell them?

A. I thought it was useless for me to tell them because it was a pain that did not stick to me, it came on and off. I thought it would wear off.

Q. The counsel asked you on cross-examination if you went down to the wharf and asked Joe Fern where you should go to get money, and he told you and thereupon you did go to the place where he told you to go and you

(Testimony of Samuel Palapala.)

went there and got money? Who was it told you to go to Joe Fern?

Mr. STANLEY.—That was gone into on the direct.

Mr. DUNNE.—That is enough.

Q. You said after you were injured you got certain treatment from the plantation doctor. I wish to know whether the Plantation Company sent out to the ship to bring you to the hospital or whether the capain of the ship sent for you? Who was it that told you to go to this hospital?

A. It was the captain of the ship.

Here ends the testimony of Sam Palapala.

Whereupon Dr. F. H. HUMPHRIS, a witness on behalf of the libelant was called, sworn, and testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. Doctor what is your profession?

A. Physician and surgeon.

Q. How long have you been practicing?

A. Ten years.

Q. Are you a graduate of any institution and if so, what?

A. M. D. and C. M. Royal College of Surgeons of England, Fellow of the Royal College of Physicians of Edinburgh, Licentiate Royal College of Physicians of London, member Royal College of Surgeons, England.

Q. Have you had any hospital experience?

(Testimony of Dr. F. H. Humphries.)

A. Fifteen years.

Q. In what hospital?

A. Edinburgh Royal Infirmary, University College Hospital, London, Hospital of St. Peter and St. John, Brussels, Rohunda Hospital, Dublin, all over two years.

Q. How long have you been practicing in Honolulu?

A. Five years.

Q. Do you know the libelant in this case, Sam Palapala? A. I do.

Q. Have you had occasion to make an examination? of him? A. Several.

Q. What was the general character of the examination? How thorough?

A. As thorough as I thought necessary.

Q. Will you state the result of that examination of him?

A. He had a recently united fracture of the right clavicle. He had a large amount of callous surrounding it, that is about all.

Q. Can you fix the time, doctor, when you first examined Palapala?

A. Early in April about ten or twelve days after the accident happened.

Q. After that time did you have occasion to see him again? A. I saw him yesterday.

Q. Have you any statement to make after the examination you made yesterday, as to his capacity to work or labor at his occupation of seaman?

A. When I first saw him I thought it was a case of fracture of the clavicle which would work off in three or

(Testimony of Dr. F. H. Humphries.)

four months but yesterday I found he was complaining of pain and I would not want to make any statement at all. I do not feel that any medical man could make any positive statement as to when that man can be back to work if at all.

Q. In your opinion can you say when he could work?

A. No, sir.

Q. I will ask you—you have sat in the courtroom and heard all the testimony?. A. Yes.

Q. Take an accident such as has been developed in the testimony in this case and I will ask you whether or not as a professional witness, you can say what amount of pain, physical pain, would ordinarily attend such an accident?

A. That would depend very much on the nature of the fracture, it is impossible to say.

Q. Take a case the result of a fracture of that kind where it appeared that the person receiving the fracture was knocked down, was knocked insensible and remained insensible during the time the boat was being rowed fifty to one hundred yards to where the steamer was at anchor and that after that he was unable for a time at least to obtain his natural sleep, what would you say to such a case as to the kind of pain?

A. The pain would be severe probably.

Q. Take a case like this: The arm of that man is struck by a large heavy weight, weighing nearly twelve hundred and fifty pounds, knocked down, became insensible, was subsequently brought out to the steamer, for a time afterwards he was unable to get natural sleep, is

(Testimony of Dr. F. H. Humphries.)

brought to the hospital, his arm is bandaged, wears the bandage threee weeks, during part of that time he is suffering pain from this break in the clavicle contemporaneously with removal of the bandage, the pain from the fracture of the clavicle diminishes and ceases, goes on for a time, after while another pain breaks out in the neighborhood of the fracture but not immediately at the fracture, but that pain is not a steady pain but is an intermittent pain, sometimes appears and sometimes don't, only a little thing causes it to start, at night-time it starts into action, is not steady but it is intermittent, assuming these to be the facts, what would your professional opinion be upon conditions such as that?

(Counsel objected to the form of the question on the ground that it did not correctly represent the testimony in this case the witness having testified that on some occasions it did not pain him but it pained him a little at night.)

Q. We will assume, doctor, that this pain is not continuous, that is this second pain, but that it started into being maybe by the starting of any movement of the hand or arm, or at another time in the night when the patient seeks to turn in his bed. Assuming, if you please, that in all instances when the pain appears, it is the result of turning of some part of the body, that it is superinduced principally into being by pressure of the body. Assuming such to be the facts what would be your professional opinion as to the cause?

A. It might be the beginning of a tubercular joint.

Q. Would you say that it is not.

(Testimony of Dr. F. H. Humphries.)

A. I would not say that it is not.

Q. What do you mean by saying that it may be a tubercular joint?

A. That tuberculosis has set in, in the articulation itself.

Q. Made by what conditions?

A. The traumatism or the injury is the cause.

Q. Is there any other condition that might result from such an injury as this, which might interfere with the earning capacity of the libelant? A. Yes.

Q. What?

A. It might be neuralgia of the joint.

Q. Please explain.

A. Neuralgia of the joint is a disease which may appear as a result of various things but generally as a result of injury. There are no physical signs, it crops out as a general rule sometime after the injury. It is not a constant thing but is intermittent in character, does not increase in pressure, is not cutaneous, does not increase upon drawing the two surfaces of the joints together, is not steady and not strictly in one place or region.

Q. Could a condition such as that result from an injury as has been described in the testimony?

A. Yes.

A. Assuming that either one of these two conditions should result, either at the shoulder joint, should be tubercular or that there should develop neuralgia of the joint, what effect would that have upon the ability of this man to work?

(Testimony of Dr. F. H. Humphries.)

A. Of course if it were tubercular it might mean his loosing the arm, his loosing the shoulder joint and even the loss of his life. One cannot say where it would finish. It is sure that the effect would be to shorten his life. If it were neuralgia it might pass off and it might not. If an amputation had to result there might be aresection of the nerve and a deformity, contraction would follow.

Q. Have you had practicable opportunity to see a case of this kind?

A. I have seen two cases just before leaving the hospital where there was a very hard lesion.

Q. Take this case would you say that the patient exhibits the characteristics of tuberculosis or neuralgia?

A. I am inclined to think that it is neuralgia but I would not say that it was not tuberculosis.

Q. Your opinion is that it is neuralgia of the joint but you would not say it was not the beginning of tuberculosis? A. No, sir.

Q. Assuming that this case exhibits neuralgia of the joint, in your opinion would that incapacitate this man from earning a living.

A. It is impossible to say, it might come to amputation.

Q. In your opinion would you say the injury was serious?

A. Since yesterday I would say it certainly was.

(Testimony of Dr. F. H. Humphries.)

Cross-examination.

(By Mr. STANLEY.)

Q. Give the dates of your examination of this man.

A. The beginning of April about twelve days after the accident,

Q. How many other examinations have you made?

A. Two.

The COURT.—Three in all? A. Yes.

Q. When was the second one made?

A. Yesterday morning.

Q. The third?

A. Just now and I have been watching him while he has been in court.

Q. When did you first hear of this second pain?

A. Either day before yesterday or the day before that.

Q. How did you hear of it?

A. Mr. Dunne told me.

Q. When did you first hear it from the patient?

A. When I saw him. Mr. Dunne didn't think anything of it but he told me of it himself before he had more than taken off the bandages.

Q. You heard the witness state that he didn't think it was worth to tell the doctor about it and he thought it would pass off? A. Yes, sir.

Q. You say this might be caused from either of two causes; tuberculosis or neuralgia?

A. Incipient tuberculosis or neuralgia.

Q. You are not prepared to say it is that?

A. I am not prepared to say which it is.

(Testimony of Dr. F. H. Humphries.)

Q. You say in this case it might be either?

A. The symptoms are very similar. Beginning to pain at night when asleep would point to tuberculosis. Coming on without cause would point to the other.

Q. Coming on without cause—

A. It would point to neuralgia.

Q. Now what symptoms did you find of either?

A. General pains.

Q. What else.

A. The history. That it had a period of quiescence.

Q. Is the history a symptom? A. No, sir.

Q. What other symptoms are there?

A. Absence of increased pain on pressure.

Q. The fact that he had pain then, there is a symptom to you of one of these things? A. Yes, sir.

Q. Tuberculosis or neuralgia.

A. Neuralgia, sir. If it were the pain of the average patient in pressing it he would complain of more pain. In tuberculosis this is different.

Q. What evidence of pain have you?

A. The patient's word, also the fact that I believe his word because if he were lying it would not be possible to conform to the tests which I put him to. He could not have imagined that the pain was cutaneous. The pain is greater, away from the fracture than at that point. A man would not be likely to invent that. The fact that he did not think it worth while to complain about it and the fact that he didn't think it amounted to anything make me believe it.

(Testimony of Dr. F. H. Humphries.)

Q. In what way could the injury cause neuralgia of the joint?

A. Any slight traumatism to the joint.

Q. Is it not a fact, doctor, that these complications are exceedingly rare caused by a simple fracture of the clavicle?

A. Yes. That is hardly fair, if you take one bone it might be so but if you take all fractures then the fact is that they are not rare.

Q. Is it not a fact that complications such as described by you are exceedingly rare in the simple fracture of the clavicle?

A. No, I would not say it was excedingly rare.

Q. Was the fracture re-united?

A. Yes, as fas as I could tell.

Q. Before yesterday morning of this week from your examination of the libelant you had no reason to believe that there was anything troubling him more than the simple fracture of the clavicle?

A. I did not think so.

Q. There was nothing to indicate that there was anything else?

The COURT.—It is not a good thing to break a man's collar-bone anyway.

Q. Is not this one a simple case of fracture?

A. I think so.

Q. Are these fractures common?

A. I have not the full statistics, and I would not say

(Testimony of Dr. F. H. Humphries.)

but I think they are. However, I have had more fractures of ribs than of clavicles.

Q. Is there anything external, Doctor, to indicate the presence of such complications?

A. External, you say?

Q. Yes. A. The callous on the collar bone.

Q. What does that indicate?

A. The hardness of the callous would show a superficial union only.

Q. Would that the fact that he is suffering pain when he jerks his arm suddenly or when he rolls in bed at night, would that indicate that the fracture is not properly united?

A. He has no pain in reference to the joint itself.

Q. He says he feels pain in the shoulder?

A. Yes, his statements are quite possible. (To Mr. Dunne.) "Might I ask you how long his shoulder has been out of bandages?"

Mr. DUNNE.—Three weeks after he arrived at the hospital. He was injured the 19th and taken into the hospital the 22d. Three weeks from the 22d of March.

A. (Continued.) I would like distinctly to say that it would be a week that there would be pain in the arm and then the pain would cease, but he would have to get back of the use of his arm.

Q. You have heard what he said; that he carried his arm in a sling, that whenever he moved his arm suddenly and whenever he rolled at night it pains him.

(Testimony of Dr. F. H. Humphries.)

Would that effect be explained by not attempting to use his arm? Would that explain his pain in the shoulder caused by sudden movements?

A. I should think that within three weeks the clavicle pain would be pau. (Extinct.)

Q. Even if the man had not used his arm in any shape or form, would he not experience pain if he attempted to use it in any way after its being bandaged up for three weeks?

A. If he didn't use that arm for any purpose whatever, not even for putting on his coat, I would agree with you.

Q. If he did nothing at all?

A. If he didn't use his arm at all. But I understand in the first place that he did attempt to use it.

Q. Would not he experience pain in the shoulder if the man carried his arm bandaged for three weeks?

A. If he carried his arm that length of time, and if he did not attempt to feed himself, I would agree with you.

Q. You have heard the testimony.

A. I say I heard him testify that when out in the street whenever he swung his arm he felt this pain.

Q. You spoke about two cases you came across, and you named the hospital, in your travels around the world, located at Dublin. Is not that a lying-in hospital? A. It was connected with the university.

Q. Do they receive fractures?

(Testimony of Dr. F. H. Humphries.)

A. Yes, they receive fractures.

Q. Of the clavicle?

A. Any woman who has been there can come back whether they have a fracture or anything else.

Q. Was not part of your hospital experience at a lying-in hospital?

A. Yes, but only six months out of fifteen years.

Q. These two cases you have spoken of as exhibiting these serious complications, were they cases of simple fracture?

A. One was longitudinal fracture of the femur, and one was a Cowles fracture.

Q. Neither of the clavicle? A. No.

Q. What is a Cowles fracture?

A. A simple fracture of the tibia.

Q. You say those were caused by something else?

A. The complications were caused by the fracture.

Q. I ask you, is the union complete union of the bones? A. Yes.

Q. Without these complications that you think may possibly have been caused from the fracture, would the usefulness of the hand and arm be interfered with in the case of the simple fracture of the clavicle?

A. I object to the use of the words "may possibly."

Q. Make your explanation, Doctor.

A. I could not say the usefulness of the arm would not be impaired after recovery.

(Testimony of Dr. F. H. Humphries.)

Q. You are not prepared to say that tuberculosis exists? A. No.

Q. You are not prepared to say it is neuralgia?

A. No, but in my opinion it is one or the other.

The COURT.—You admit that you are a human being and subject to error even in your profession?

A. Yes.

Q. Suppose this man has none of these serious symptoms, which you have so well described, suppose it had proven to be a simple injury such as a man would receive in the way he was injured. I want to ask you as to the probabilities of his going to work? How soon could he go to work as sailor?

A. If these things don't exist, he could go to work in a couple of months at the farthest.

The COURT.—If your fears should prove to be true, what then?

A. If he has tuberculosis he may never go to work again. If tuberculosis does exist at the joint it destroys the articulation and may destroy the life.

The COURT.—Any time?

A. Yes.

Q. Would he be able to do light work? A. Yes.

Q. On board ship? A. Yes.

The COURT.—Is there such work as light work on board ship?

A. I never heard of any.

(Testimony of Dr. F. H. Humphries.)

Redirect Examination.

(By Mr. DUNNE.)

Q. If, as you think, he has neuralgia, how long would he probably live?

A. That is impossible to say. It might cause contraction, resection or even amputation.

Q. Might any of these things occur in such cases as you have mentioned?

A. Cancer might be started by neuralgia of the joint.

Here ends the testimony of Dr. F. H. Humphris.

Here the libelant rested.

The Court here ordered an adjournment until nine o'clock to-morrow morning.

In the United States District Court, in and for the Territory of Hawaii.

IN ADMIRALTY.—Hon. MORRIS M. ESTEE, J.

SAMUEL PALAPALA, Libelant,
vs.
PAAUHAU PLANTATION CO., Defendant.
} No. 32.

Honolulu, May 9, 1903.

The hearing of the above-entitled cause was resumed at 9:00 o'clock this 9th day of May, nineteen hundred and three, pursuant to adjournment of the day before.

Present, libelant and his proctor, J. J. DUNNE, Esq., and the defendant by his proctor, HOLMES and STANLEY.

Whereupon Captain D. F. NICHOLSON, a witness on behalf of the defendant, was called, sworn and testified as follows:

Direct Examination.

(By Mr. STANLEY.)

Q. What is your full name?

A. Donald Francis Nicholson.

Q. What is your occupation?

A. Master of the steamer "Helen."

Q. That is the steamer belonging to the Wilder Steamship Co.? A. Yes.

Q. Do you know Palapala?

A. Yes, sir, he was part of my boat's crews.

Q. One of the crews of the steamship "Helene"?

A. Yes, sir.

Q. Do you remember the occasion on which he was hurt?

A. I remember his collar-bone being broken; I remember he got hurt by a sling load of sugar.

Q. What day was it?

A. The 18th or 19th of the month, I have forgotten the exact date.

Q. What time of the day?

A. Twenty to twenty-two minutes past one in the afternoon.

The COURT.—Is it the 18th or the 19th?

(Testimony of Captain D. F. Nicholson.)

A. I have not the log-book, I don't remember. It was Thursday, I think.

Q. Thursday?

A. Yes, I think Thursday, the day following the Kinau.

Q. That would be the 19th? A. Yes.

Q. How long have you been running the "Helene"?

A. About two years.

Q. How long have you been running on the Hamakau coast?

A. All the time I have been running on the "Helene," but I have been running on other boats in the meantime.

Q. What other boats?

A. The steamer "Hawaii."

Q. How long was that?

A. Twenty-two months. I was on that most of the time at Hilo or along Puna and the Hamakua coasts.

Q. How long have you been working on the Hamakau coasts? A. Two years directly.

Q. In all about four years?

A. Three years and eight or nine months.

Q. Will you state the condition of the weather on the day that Palapala got hurt?

A. It was bad weather.

Q. Both as to wind and sea?

A. It was the worst kind of a sea off the Hamakua coast. The wind was north, directly across the track

(Testimony of Captain D. F. Nicholson.)

of the rollers, right between of each one making a blind swell.

Q. What is that?

A. The sea rolls in a way that you can not judge the distance at all. One hundred feet from the landing at Paauhau you get 19 to 20 fathoms, then it drops to 40 to 45 fathoms. The sea rolls with a blind swell; it rolls in such a way because the depth jumps from 230 feet to 20 fathoms.

The COURT.—Do you anchor?

A. It is too deep. We only anchor when the weather is not rough.

Q. What about the coast?

A. It is very abrupt, with many rocks lying around there.

Q. Where was the sea breaking on this day?

(Question objected to on the ground that there were two questions included in one.)

Q. Where would this sea along that coast ordinarily break?

(Question objected to as immaterial.)

The COURT.—The Captain will state nothing except what he saw.

Mr. STANLEY.—All I am asking is, where the sea would ordinarily break along the coast.

The COURT.—He may state as to this morning, the day of the accident.

A. That morning the weather was very bad. I went

(Testimony of Captain D. F. Nicholson.)

to Wookala early in the morning. I left Paauhau 20 minutes to 4; we went in to Wookala, where we had to work on a wire, which is more dangerous than working under—

Mr. DUNNE.—I move to strike out the statement of the witness about working under a wire being more dangerous than working under a derrick.

Mr. STANLEY.—No objection.

The COURT.—Strike it out.

Q. Did you work there?

A. We did not work because it was too rough, so we went back to Paauhau, thinking we would work there. We got there at 8:40.

Q. What were the conditions there?

A. We got back about 8:40 and 9:45 or 9:50, my first boat went in to the landing, and it took an hour and ten minutes to get one line fast. The boat carries a heaving line, to which is made fast a bow line 7 inches in circumference and 3 1-3 in. in diameter. After we dropped anchor in 130 feet or 20 fathoms of water, I sent the boats ashore to make fast. They were nearly forty minutes in trying to make fast, when two of the men jumped on the rocks and took the heaving line. Sometimes it takes five minutes, sometimes ten, sometimes twenty, and sometimes an hour. Two or three natives took the heaving line and rove it over an eye-bolt, hitched on and made fast. Then they jumped back or swim back to the boat, depending on whether the boat

(Testimony of Captain D. F. Nicholson.)

can get close enough for them to jump in or out. The first boat went alongside the landing a few minutes before ten?

Q. For what purpose?

A. To take the sling into bring out the sugar.

Q. To whom do the slings belong?

A. To the ship, sir, always.

Q. Did you see the accident to Palapala?

A. Yes, I was looking positively at the time.

Q. Will you describe to the Court fully what the conditions of weather were, both as to wind and sea?

A. The wind was in the N.W. to N.N.W. That is, the wind was blowing directly on the shore. The sea was a little northerly. It is the worst kind of a sea that we have on the Hamakua coast. When the trades are blowing from the N.E. it produces a sea that is bad, especially with a sea from the north.

The COURT.—When the sea is from the north, it is difficult to handle a boat?

A. Yes. In fact, we stop work with half a wind. We have to go to work from another direction.

Q. You spoke of blind rollers coming in. Where do they break?

A. They may dash up against the landing. Sometimes it will take a boat and shove it right over.

Q. What would be the effect of these big waves breaking near the landing and the boat?

A. If the boat is not head on, it will roll it right over.

(Testimony of Captain D. F. Nicholson.)

Q. What do you mean by roll it over?

A. Capsize her.

Q. When the boat is head on to the sea?

A. Sometimes it throws the steersman out of the boat, and sometimes the other men.

The COURT.—If the boat was not kept head on, it would roll over in such a sea, is that right?

A. Yes.

The COURT (To Mr. STANLEY).—Judge, the boat did not tip over. What has this got to do with it?

Mr. STANLEY.—We want to get at the state of the weather.

The COURT.—If the defendant intends to show that the winchman was mistaken or that he received notice, or any other fact tending to show his cause for lowering the sling load, that would be evidence, but as to the condition of the sea, and what would have occurred if the boat had rolled over, inasmuch as the boat did not roll over, the Court don't see what it has to do with the case.

Mr. STANLEY.—We deny that the winchman allowed the sling load to descend suddenly into the boat. We claim that a wave raised the boat up against the sugar with such force as to injure this man.

The COURT.—That the boat went up and struck the sling?

Mr. STANLEY.—That is what we claim.

(Testimony of Captain D. F. Nicholson.)

The COURT.—That is a hard proposition for a layman to understand. What we want to know is, what happened that morning.

A. I would like to tell it just as I saw it.

The COURT.—That is all right.

A. I was sitting by the rail of the steamer, and when I would see my vessel roll very heavily in an exceptionally large swell, I would whistle to them, and when they heard me whistle, they would start to pull out from underneath the crane as quick as they could. The whistle was a warning that a big swell was coming in.

The COURT.—Could you whistle loud enough to be heard?

A. I think I could whistle loud enough to be heard down at the post office. (A distance of five blocks.)

Q. What would they do when they heard your whistle?

A. They would always then pull out from danger.

Q. What danger?

A. The danger of the boat being under the crane or dashed to pieces. Then when thy saw this sea was past to the best of their judgment, they would back the boat underneath the crane again close enough so that they could receive the slings of sugar. This time, I think the boat had been in and out, in and out three times. This was the second or third time they had been under the hook. That is I whistled for them to come out and they came out. That time they got underneath the hook was

(Testimony of Captain D. F. Nicholson.)

the third time they had been under the crane. A big swell had come and I had whistled and that told them to back out until the swell had passed. They got back this third time when this accident happened. That is, they had circumnavigated three times.

The COURT.—Did the waves have anything to do with the lowering of the sling of sugar?

A. It has nothing to do with that, but when the boat was in position to receive the sling of sugar, but, Judge, when the big waves came in, the space between the stern of the boat and the rocks is small and if they don't get a move on the boat headways the serge of that sea will throw the boat on the rocks.

The COURT.—All the witnesses say that.

A. They got the boat back—as near as I could see—and they got the boat back in—and I was three hundred and fifty feet away—underneath the hook when the load of sugar—the derrick swings around and picks it up off the wharf. One of the Japanese, when they raise the sling up, pushes it out on the gaff when—they have a stationary guy on that gaff on one side made fast. They have a man on the other side who pulls in any slack and takes a turn around a post—

Q. What is the gaff?

A. It is the derrick where the fall is.

The COURT.—The gaff is the arm of the derrick that hangs over when the derrick is trimmed? A. Yes.

(Testimony of Captain D. F. Nicholson.)

Q. Right over the gaff is the fall? The sling of sugar is hung on the fall? A. Yes.

The COURT.—The winchman when he undertakes to let go, lets go the winch and the sugar falls by it own weight?

A. Yes, that is it. The boat has to go as near under the hook as possible.

Q. Is not the boat right underneath?

A. Sometimes it is not. If the sea is good, they put their feet on the gunwale of the boat and pull it in. The sea is not steady and sometimes it is over half out.

Q. The sling falls perpendicularly?

A. Not essentially so.

Q. What prevents it falling perpendicularly?

A. There is no agency except the motion of the boat that will cause it to be different, when the sea is exceptionally large. Any sea will cause the perpendicular motion. There was no motion of the sling on this occasion that had anything to do with it.

The COURT.—That is, you say the sea is so high, or the waves are so high, that it raised the boat up and hurt the man by being bumped against the sling?

A. No, the sling against him. There is a position for each. There are two to receive the sugar. He was in the aft part of the boat. There are four men besides the captain in the boat; two men pulling on the oars and two men to receive the sling.

(Testimony of Captain D. F. Nicholson.)

Q. Did any one order the winchman to lower the sugar? A. The winchman did not let it down.

Q. How did it get down?

A. The sea lifted the boat up and dashed it against the sling.

The COURT.—If the sling had been forty feet up?

A. If it had been forty feet—this work has to be done almost in a second, it almost has to be done in a second.

Q. It requires a good deal of imagination on the part of a landsman to say that the boat jumped up against a load of sugar?

A. My testimony is, that the sling load was hanging and the winchman did not drop it. As I saw it the boat dashed in and I saw him hit by the sugar.

Q. What do you mean when you say the winchman did not let the sugar down?

A. I mean I did not see it come down. If the engine is running, you can see her steam.

Q. Where was the sugar?

A. Swinging out over the boat as it always is, before the boat goes in.

Q. How high over the boat?

A. The sling would be any where—I could not say positively, about six to eight feet, possibly nine feet above the water.

The COURT.—By water, you mean the level of the ocean?

(Testimony of Captain D. F. Nicholson.)

A. The level with the sea, when the boat was in an ordinary situation.

The COURT.—What if the waves run 20 feet high?

A. They would go up to the landing.

The COURT.—It would wet the sugar?

A. It was wet. It had to go back to the mill.

The COURT.—Did it wet it?

A. Yes, it was wet, and they had to send it back to the mill, and run it through the centrifugals, that sling load.

Q. Had you anything to do with its going back to the mill? A. No, that is my information.

The libelant moved to strike out the testimony relative to the sugar having been sent back to the mill, on the ground that it was hearsay.

(No objection was offered by the defendant, and the motion was granted.)

Q. It has been testified to, that this winchman suddenly and without warning or signal let the sling load descend to the boat with such rapidity that the men in the boat could not stop it, what have you to say in regard to that? A. I did not see that.

Q. Can you say whether or not it is a fact?

(Question objected on the ground that witness testified that he did not see it.)

Q. Did you see the accident?

A. Yes, I saw the accident. I saw the plaintiff as he was in the boat, I saw the whole accident.

(Testimony of Captain D. F. Nicholson.)

Q. How did the condition of the weather in the afternoon compare with the condition in the morning?

A. It was worse in the morning, but in the afternoon about three o'clock it became a good deal better.

Q. How many slings were taken at a time in each boat during the morning and up to three o'clock in the afternoon?

A. From 10 o'clock until 12:55, 26 bags; and in the entire day we took off 1000 bags.

Q. How many at a time?

A. One or two, or three, very seldom three.

Q. In calm weather how many do you take at a time?

A. Four or five, sometimes six.

Q. What is an average days work, you say you have taken off 1,000 bags?

The COURT.—In fair weather?

A. Anywhere from 4,500 to 6,000 sacks.

Q. Were you where you could see the winchman if he had suddenly let go the sling load?

A. I could see the steam; I could see steam go out of the pipe. When it escapes it makes an awful noise. The pipe is full of holes, and we were lying about 100 feet away, and we could always see 7 or 8 jets of steam come out of the holes in the pipe. The very minute the winch turns you can see the steam go out. I neither heard nor saw it.

Q. Did I understand you to say something about it dropping down of its own weight, what did you mean?

(Testimony of Captain D. F. Nicholson.)

A. The Judge asked me if it fell by its own weight.

Q. What did you mean?

A. The dropping of the sugar pulls the winch backwards. The weight of the sugar hauls the sugar down. Whenever you move the sugar up or down you move the whole machine. You cannot move the sugar without moving the winch.

Q. Cannot the sugar be lowered without moving the winch?

A. It is impossible. If it is lowered down it pulls the winch backwards.

Q. The design of the winch is such, that it has to move whenever the sugar does?

A. That is correct.

The COURT.—The Court has seen them raising coal out of a ship, is it not done the same way

A. In one way, but in one way not. The steamship "Claudine" has such a winch, but that is the only one on the Islands, except the one at Paauhau.

Q. Does it raise by steam power? A. Yes.

Q. And it lowers by steam power? A. Yes.

Q. It don't fall by its own weight? A. No.

Q. It don't fall by its weight?

A. I didn't understand your question properly the first time, I would like to correct it.

The COURT.—Sugar don't fall in any case.

A. No, the engine must be working in any case to lower it or to hoist it up.

(Testimony of Captain D. F. Nicholson.)

Q. Did you see when Palapala was hoisted aboard the steamer?

A. Yes, sir, we lowered the sugar sling for him on the donkey fall, and put him in a double sugar strap and put it on the hook.

The COURT.—And hoisted him up?

A. Yes, sir.

Q. What did you do then?

A. I took him to my room and felt his collar blade, and found it broken in two places. I made the steward hold it there until I bandaged it, but I saw that was no good, it sprung out again, so I sent the boat in for the box; the box that we use to take passengers ashore in. When the box came I put him in the box, and sent him ashore to Mr. Gibbs, the manager.

The COURT.—That is, you did everything you could do yourself, while you had him under your control?

A. Yes, sir, I did what I could, but I have not much knowledge in that line, so I sent him to get medical aid.

Q. Why did you do that?

A. For the simple reason that I did not know enough to set that collar bone properly. Whenever he moved, it would pull down and cause him pain, so I said he had better go ashore to the first doctor.

Q. Does this plantation own any boats?

A. None that I know of.

Q. The only way to get from the "Helene" to the plantation was by one of your boats, or by this passenger box? A. Yes, sir.

(Testimony of Captain D. F. Nicholson.)

The COURT.—Was this a position of danger?

A. It is always dangerous. In the calmest kind of weather it is dangerous.

Q. At that time is it dangerous?

A. At any time, it is always more or less dangerous. Sometimes more, but when that north swell is on it is worse.

Cross-Examination.

(By Mr. DUNNE.)

Q. As I understand your testimony, the up and down movement of the sugar is regulated by the winch?

A. Yes.

Q. The raising and lowering of the sugar is controlled by the winch? A. Yes.

Q. And the movement of the winch is controlled by pushing backwards and forwards the lever?

A. Yes.

Q. And the man who pushes backwards and forwards that lever is the winchman of the plantation company? A. Yes.

Q. And that winchman, by merely pushing backwards and forwards that lever can raise or lower that sugar? Now can you say whether a man in that position could have seen this boat at the time this man was hurt? A. Yes, he could see it perfectly.

Q. You say when this man got aboard the steamer you were compelled to push the break in the shoulder twice?

A. I tried it once but it jumped out again.

(Testimony of Captain D. F. Nicholson.)

Q. You said you had to have the steward hold it?

A. Yes, I said he had to hold it, while I was trying to bandage it in place, but I did not know enough to do it.

Q. And it sprung out twice?

A. The weight of his arm sprung it out.

Redirect Examination.

(By Mr. STANLEY.)

Q. Do you know anything about medical treatment?

The COURT.—That is immaterial.

Q. Is it possible to judge when there will possibly be a rise or fall of the waves when the boat is under the sling.

A. I think it is almost impossible, but these kanakas have eyes like cats and they can see a wave three thou- said feet off (last part stricken out as not testimony).

Q. You say it is impossible?

A. I have been deceived so badly myself that I have been dumped out at Paauhau and other places and to the best of my ability and judgment, speaking for myself, it is impossible to judge how high a billow is going to be.

The COURT.—Then it was a position of danger that the men were in at that time? A. Yes.

Recross-Examination.

(By Mr. DUNNE.)

Q. You have been going to sea how many years?

(Testimony of Captain D. F. Nicholson.)

A. About thirty years.

Q. How long have you been a master mariner?

A. Off and on ten years.

Q. Do you say with your experience as an officer, and a master of a vessel for ten years, that you cannot judge as to the height of these waves as they come in?

A. That is practically the idea, yes.

Q. Here is a Portuguese winchman, who sees the boat, and who sees and knows that all he has to do to raise or lower the sugar is to move the lever, how is he to judge of the height of these waves coming in from time to time? A. It may not be necessary.

The COURT.—Why not?

A. To begin with, on account of the house, that this Portuguese is in. His vision is shut off, so that he cannot see the big seas come in, if he could it would make him nervous. He can just see the boat at the landing, and not much else. He would not have the constitution to stand it. Sometimes I was excited myself.

Q. Now, do I understand you to say, if with your experience of thirty years on the sea, including your experience of ten years as master of a vessel, if you cannot judge of the height of these waves, I want to know how this Portuguese winchman, put in charge of this dangerous thing, can judge the height of the waves, and so protect those men underneath.

(Question objected to on the grounds that it is totally at variance with the pleadings.)

(Testimony of Captain D. F. Nicholson.)

The COURT.—The Court will allow this captain to testify.

A. My experience and my knowledge is that this Portuguese cannot see much more than the boat at the landing. The arc of his horizon is restricted.

The COURT.—Then you claim that the winchman was not to blame for this injury?

A. Not the injury.

The COURT.—Who was to blame?

A. I cannot say anybody was to blame. I don't think that Keau was to blame.

The COURT.—Either your company was to blame, or the Wilder Steamship Company was. (To Mr. Dunne.) The Court will allow you to amend your libel, to make the Wilder Steamship Company parties, if you desire.

Mr. STANLEY.—I don't think that necessarily either the Wilder Steamship Company or the Plantation Company was to blame.

The COURT.—Somebody is to blame, because this man is hurt, by something that is not under his control.

Q. A few minutes ago didn't you say, in answer to a point blank question that this winchman could clearly see the boat?

A. He could clearly see the boat, yes, there is no doubt of his seeing the boat, Judge. He could simply see the boat taking the sugar. The house is built so that he canot see my steamer.

Q. How does the house face?

(Testimony of Captain D. F. Nicholson.)

A. He looks straight down. He must stand with his right hand on the lever looking at them, if he wants to see.

Q. So the tower is so built that he must look down?

A. There are four sides, there is no way he can see.

The COURT.—Was it so built because it would make him nervous?

A. I do not know. I say it would make me nervous to watch. I watched them and it made me very nervous.

The COURT.—And you were staying on the deck of ship? A. Yes.

Redirect Examination.

(By Mr. STANLEY.)

Q. You say that this man cannot see the steamer, why is that?

A. Because the side of the house is so built and he cannot see through the side of the house.

Q. How does this winchman know, what guide has he in letting the sugar down?

A. A native usually calls out "hapai," sometimes one and sometimes all three.

Q. He gets the order from the boat?

A. He always hears but sometimes he gets a moving signal when he can't hear because of the sea dashing against the rocks. It is given by motion.

Q. It is not anyone connected with Paauhau but always some one in the boat or in charge from the steamer?

A. Yes.

(Testimony of Captain D. F. Nicholson.)

Recross-Examination.

(By Mr. DUNNE.)

Q. Was the sea dashing against the rocks, on this occasion when this man got hurt?

A. Yes, of course it was.

Here end the testimony of D. F. Nicholson.

Whereupon RICHARD WESTOBY, a witness on behalf of the defendant, was called, sworn and testified as follows:

Direct Examination.

(By Mr. STANLEY.)

Q. Where do you live?

A. Paauhau Plantation, Hamakua, Hawaii.

Q. How long have you been on these Islands?

A. Since 1891.

Q. How long have you been on Paauhau Plantation?

A. Eight months.

Q. What is your business on the plantation?

A. In charge of Paauhau landing.

Q. Were you on the plantation on the 19th of March, this year? A. Yes.

Q. Where abouts on the plantation?

A. At the landing.

Q. Do you remember the occasion upon which one the sailors of the "Helene" got hurt? A. Yes.

Q. The 19th of the month? A. Yes.

Q. Where were you?

(Testimony of Richard Westoby.)

A. Near the landing looking down towards the foot of the landing.

Q. Did you see the accident? A. I did.

Q. Was there anything to obscure your view?

A. No.

Q. What time did it take place?

A. In the afternoon, a short time after lunch.

Q. Can you give us a little closer idea, as to time?

A. Between one and two o'clock.

Q. What were the conditions of the weather that day, as to wind and sea? A. Very rough.

The COURT.—That is the sea was rough?

A. The sea was rough, yes, sir.

Q. How was it at the time the accident took place?

A. It was very much the same all day.

Q. Will you describe to us in your own language, how this accident took place?

A. I was standing at the window of the landing.

Q. What do you mean by the window at the landing?

A. A hole in the building, near the head of the building.

The COURT.—Some kind of a house?

A. It is known as the landing.

The COURT.—It is known as the landing?

A. It is the landing.

The COURT.—That is the landing at Paauhau?

A. Yes.

Q. What is that, a warehouse or what?

(Testimony of Richard Westoby.)

A. I would like to explain what I mean by it. To one side there is a shed where the steam is generated to work the winch. The sugar is stored in the house. In fact the landing is a kind of warehouse.

(The libelant moved to strike out the answer on the ground that it was irresponsive to the question.)

The COURT.—The Court will stop him when I think he should be stopped; what is the answer?

A. I was standing near the window.

The COURT.—In a kind of house?

A. In the sugar warehouse. That is also called the landing.

Q. Is this on the mainland or on the wharf?

A. The mainland.

Q. How far is that from the wharf?

A. About 150—145 to 150 feet.

The COURT.—Well, go ahead.

A. I saw the sling load of sugar was in the fall at the foot of the landing, hanging on the crane. The boat was underneath the sling of sugar that was hanging there. There were two men ready to receive the sugar as it would come down. The sugar was standing perfectly still. The rollers coming in raised the boat, and sometimes drifted it shorewards. At the same time, these men were standing reaching for the sugar, in this position (indicating a position of the arms outstretched above the head). A roller struck the boat, it also raised her and jammed him. The winchman then started to

(Testimony of Richard Westoby.)

take the sugar up. The boat receded down, and the boys pulled away from the landing.

Q. You say you were at that time 145 to 150 feet away, what do you mean?

A. One hundred and forty-five to one hundred and fifty feet above the boat on the landing.

Q. You were looking down?

A. I was looking an inclined plane.

Q. How far were you away in a direct line?

A. I am not sufficiently good in mathematics to tell you exactly how far I was in a direct line.

The COURT.—Tell us about how far.

A. Nearly 50 feet in a straight line.

Q. That would mean about an angle of 70 degrees?

A. Very near it.

Q. I will ask you to look at this photograph, and state if you know, of what it is a photograph (handing witness a photograph)?

A. Paauhau landing.

The COURT.—You were about fifty feet in a straight line from where?

A. From the boat, in a straight line.

The COURT.—Go on, Judge.

Q. When this boat was lifted up, as you say, and a man in it was struck in the chest, by this sugar, how did he fall?

A. When the boat came up he was jammed between the gunwale of the boat and the sugar. The sugar held him

(Testimony of Richard Westoby.)

there until the boat receded, then he staggered and fell in the bottom of the boat.

Q. There is testimony to the effect that the winchman suddenly let the sling load fall on the man without any signal from them, what do you say about that?

(Question objected to on the ground that it is not proper cross-examination.)

The COURT.—The Court will allow him to pursue his own course.

(Question continued:) And at such a rate of speed that it could not be stopped? A. No.

The COURT.—Is this done to impeach the witnesses?

Mr. STANLEY.—Not at all.

The COURT.—What is it for?

Mr. STANLEY.—To show your Honor the truth.

Q. What became of the sugar?

A. It was hoisted up halfways so as to clear the landing.

The COURT.—Halfway up the arm of the—

A. Boom.

Q. How high is that?

A. It hoists it about 20 feet above the boat.

Q. What was then done?

A. It was allowed to hang over in the sling at that time.

Q. Was it taken into the landing? A. Not then.

Q. Was it taken into the landing at all?

A. Yes.

(Testimony of Richard Westoby.)

Q. What was the condition of the sugar?

A. It was wet.

Q. Wet by what? A. By the sea.

The COURT.—The sugar was wet by the sea?

A. Yes.

The COURT.—You went down, did you?

A. Yes, sir.

The COURT.—And you saw it?

A. I saw the sugar was wet.

Q. Was that sugar shipped on that trip of the "Helene"?

A. No, it was sent back to the mill.

Q. How much sugar was shipped that day, if you know?

A. One thousand bags in all that day.

Q. What is the average shipment per day?

A. We have shipped 6,500 bags.

Q. What is the average?

A. Four thousand to five thousand bags a day, is a fair average.

Cross-Examination.

(By Mr. DUNNE.)

Q. You were inside of that building you spoke of?

A. Yes.

Q. Were you so located that you could see in that building by looking through the window?

A. I was looking out the window, the window was open.

(Testimony of Richard Westoby.)

Q. At the time that this accident occurred, as you have described, and these waves came and pushed the man against the sling load of sugar, two things happened? First, the winchman raised the sugar up. Second, the wave receded underneath the boat, is that true?

A. Yes.

Q. Between each two waves, there is a hollow?

A. Yes.

Q. So that when the breast of the wave passed, the boat would sink into that hollow?

A. Provided there was no obstruction to break the wave.

Q. Didn't you say that at the time the winchman raised the sugar, the boat receded? A. Yes.

Q. Was that when it went down into the hollow between the two waves? A. It went down.

Q. The boat did go down at the same time the winchman raised the sugar up? A. About the same time.

Q. Was there no signal given the winchman to hoist the sugar? A. I did not see any.

Q. Did you hear any? A. No.

Q. You say the time the winchman hoisted the sugar up, it was because he could see it? A. Yes.

Q. Then the winchman saw this transaction, just as well as you did? A. I suppose so.

Q. Just before he hoisted this sugar, he had received no signal, that you either heard or saw?

A. I neither heard nor saw any signal.

(Testimony of Richard Westoby.)

Q. When you speak of signal, I infer you mean the signal from the man in the boat? A. Yes.

Q. There was nothing to prevent the winchman from seeing the place where this happened?

A. I presume not.

Q. He could see quite clearly; there was no obstruction to prevent his seeing? A. No.

Q. Could he see out upon the open sea?

A. He could.

Q. What had the winchman in the building to do, if anything, to prevent his seeing the waves as they came in?

A. I suppose he had to keep his eye on the boat.

Q. If he lifted his head, could he see the waves come in? A. Yes, if he had done so.

Q. You say you have been eight months on this plantation? A. Yes, in their employ.

Q. During these eight months your principal business has been to be in charge of their landing?

A. I did not say so.

Q. Didn't you say you were in charge of the landing?

A. Yes, sir, I did say I was in charge.

Q. How long have you been in charge?

A. Since the 16th of February, this year.

Q. So that for a whole month prior to the happening of this accident you were in charge of the landing?

A. I was.

Q. Did you say you were familiar with that landing?

A. I was.

(Testimony of Richard Westoby.)

Q. Have you ever examined the winch that the winchman was working at? A. Yes, sir, I have.

Q. This winch is situated in a small winch-house?

A. Yes.

Q. Have you been in there? A. Yes.

Q. Have you looked out of this winch-house?

A. Yes.

Q. You can see the place where the boats come in and the sea out beyond? A. Yes.

Q. You said you were looking through the window and you saw the sling load of sugar hanging there, with the boat underneath it. You also said you saw two men there ready to receive the sugar, is that correct?

A. Yes.

Q. Now, assuming the length of this end of the table to be the boat (indicating counsel's table), and that the sling of sugar is hanging so (indicating), with the boat right underneath the sling of sugar, were the men ready to receive the sugar?

A. There were two men ready to receive it and trim it. There are two men there with every boat to receive it. These men were standing ready to receive the sugar as usual.

Q. When you describe that point you put up your hands, indicating that the men were reaching for the sugar. A. I did.

Q. What was the position of this man when he was hurt? Here was the suspended sling load of sugar,

(Testimony of Richard Westoby.)

standing over his head. He lifted up his arms for the purpose of receiving the sugar? A. Yes.

Q. So that they were underneath the sling load of sugar? A. No, not beneath it exactly.

Q. If they were away from it, how do you explain their standing with their hands up, reaching for it?

A. So that when the sugar started to come down, they could push it forward or sideways, so as to trim it.

Q. They were so close to the sugar, that when the sugar came down they could direct it to the proper place in the boat?

A. If the sugar came down he was near enough so he could reach for it, and get hold of it.

The COURT.—Did it come down so fast that it could not be directed? A. I didn't come down.

Q. It didn't come down?

A. The sugar did not come down.

The COURT.—The boat went up?

A. The boat they were in, the waves raised up to it.

Q. Is it not true that to every wave there is a double motion, an up and down motion and a forward motion, you understand that? A. Yes.

Q. When you saw a wave come in, which wave the winchman could also see, would not such a wave have a forward motion?

A. Yes, it would have a lateral and perpendicular motion.

(Testimony of Richard Westoby.)

Q. Would not the effect of that wave upon the boat be both to raise it and shove it ahead?

A. It would.

Redirect Examination.

(By Mr. STANLEY.)

Q. Who was on the landing at the time this happened, this landing at Paauhau Plantation? A. Whereabouts on that landing?

Q. Where the sugar was being received?

A. Japanese laborers.

Q. Any one else?

A. No one else at the foot of that landing at that time.

Q. No one else around the landing beside yourself?

A. Mr. Gibbs might have been down there about the time of the accident, but there was no one there, except the Japanese laborers, and the winchman, and myself, and the winchman was up at the head of the landing.

Q. You say the winchman is supposed to keep his eye on the boat? A. Yes.

Q. Why is that?

A. So as to be ready to receive the signal of the man in the boat to lower the sugar.

Q. In lowering or raising sugar what was the winchman guided by? A. The signals from the boat.

Here ends the testimony of Richard Westoby.

There being no objection by counsel from either side, J. H. Hakuole was sworn to interpret from the English

(Testimony of Richard Westoby.)

language into the Japanese language and from the Japanese language into the English language.

Whereupon NAKA, a witness on behalf of the defendant, was called, sworn and testified as folows:

Direct Examination.

(By Mr. STANLEY.)

Q. What is your name?

A. Naka.

Q. What is your business?

A. I am working down at the wharf.

Q. What plantation?

A. Paahau Plantation, District of Hamakua.

Q. How long have you been in the country?

A. One year and two months.

Q. How long have you been on Paauhau Plantation?

A. I have been on Paauhau Plantation since my arrival.

Q. What is your work down at the wharf?

A. My work is lifting the bags of sugar and loading the boat.

Q. Lifting bags of sugar from where?

A. Fifty bags of sugar have been lowered, and then I take these bags of sugar and put in a high place.

Q. The sugar comes down from the high landing, on what does it come down?

A. These bags would be lowered on what is called a car. This car comes down from the upper landing to the lower landing on a railroad.

(Testimony of Naka.)

Q. On a railroad? A. Yes.

Q. It comes down as you say 50 bags in a car?

A. Yes.

Q. When the car reaches the lower landing, what do you do?

A. I would then pick up 10 bags of sugar, and place them on the ropes.

The COURT.—Then he takes 10 bags of sugar and places them on the ropes.

Mr. DUNNE.—It is stipulated that he means put 10 bags in a sling.

Q. Do you have anything to do with the work, after you put these 10 bags in the sling?

A. This is my business, to put 10 bags of sugar in a sling.

Q. What is done with that sling load?

A. Then I would make preparations for the second sling.

Q. Do you remember the day on which this man was hurt on the shoulder, getting his collar bone broken?

A. It was the month of March.

Q. You remember the occasion? A. I do.

Q. Where were you on that occasion?

A. I was working on the landing.

Q. What did you see?

A. I saw when a seaman of the steamer was hurt here. (Indicating the breast.)

Q. How did it happen?

(Testimony of Naka.)

A. The man over there (indicating the Manager sitting beside counsel for defendant) was getting ready to receive the bags of sugar from the upper landing when a swell of the waves came and moved the boat, causing him to strike the bags of sugar.

Q. Where was this sling load of sugar, just before this man was struck?

A. It was just hanging there ready to be placed in the bottom of the boat.

Q. You mean it was hanging above the boat?

A. Yes.

Q. How high above the boat?

A. About 3 or 4 feet.

Q. Whereabouts in the boat was Palapala, before he was struck by the sugar?

A. He was standing right in the middle of the boat, the center of the boat.

Q. Was there no one else standing up in the boat?

A. There were 5 people in the boat at that time, 3 of whom were attending to the oars and the steering, and 2 receiving the bags of sugar.

Q. How was it just before the accident?

A. The sugar was hanging over the boat.

Q. Just before you saw that, was the sugar hanging over the boat?

(Question objected to as leading.)

Q. Was anything done with the sugar, after you saw it hanging 3 or 4 feet above the boat?

(Testimony of Naka.)

A. Palapala was just getting ready to receive the sugar, which was hanging over the boat, when a swell of waves came and struck Palapala with the sugar.

Q. Did the sugar itself, move from the time you saw it 3 or 4 feet above the boat, until after the man was hurt?

A. Palapala was just receiving the bags of sugar, so as to put them in position in the boat, when a swell of waves brought him in contact with the sugar.

The COURT.—Can you speak English? A. No.

The COURT.—How could he attend to work with men who only speak English?

Mr. STANLEY.—They mostly use Hawaiian on the plantations.

The INTERPRETER.—The witness says he can talk English.

The COURT.—You speak English?

A. A little.

Q. How was the sea at that time?

A. The sea was very rough.

Q. How was it at the time of the accident?

A. Very rough at that time.

Q. Were the waves big or small; describe how the waves were on that day.

A. The waves were so large that they occasionally hit the landing.

(Testimony of Naka.)

Cross-Examination.

(By Mr. DUNNE.)

Q. Who told you to be a witness in this case?

A. No one requested me to be a witness in this case, except the boss of Paauhau Plantation asked me to come to court.

The COURT.—What is his name?

A. I do not know his name.

Q. Is that the gentleman, sitting here in the court-room next to Judge Stanley? (indicating Manager Gibbs of Paauhau Plantation Company.) A. it is.

Mr. DUNN.—It may be stipulated that, that is Mr. Gibbs, the Manager of the plantation?

Mr. STANLEY.—Yes.

Q. Before the manager requested you to be a witness in this case, had you said anything about what you would say? A. Yes.

Q. What did you tell him?

A. I told him what I saw.

Q. How did he know that you saw anything?

A. Well, I was at work that day. I do not know how the boss knew I knew something about it?

Q. Did many of those waves come up on the landing?

A. Yes.

Q. The fact of the matter is, that it was an unusually rough day, and the waves were very high, and so high that many of them swept up on the landing, is not that so? A. Yes.

(Testimony of Naka.)

Q. There was some sugar on the landing that got wet, didn't it? A. Some were wet.

Q. They are very big waves when they sweep up on the landing?

A. These bags of sugar were wet by the coming up of these large waves on the landing.

Q. When you say the libelant here was in the act of receiving the sugar, what do you mean by that?

A. Palapala was then reaching up his hands for the bags of sugar which were hanging over the boat, when he came in contact with these bags of sugar.

The COURT.—He says the sling load of sugar was down within 3 or 4 feet of the boat, when the waves came in, ask him how much he calls 3 or 4 feet.

A. (Witness indicates the distance between 3½ and 4 feet.)

Q. Was not that sugar as far over the boat, as is the ceiling of this courtroom from the floor?

A. Yes, about that.

Mr. STANLEY.—Does he mean that this sling load, was that distance over the boat?

A. What I mean by that is, that that is the height between the landing and the boat.

Q. Judge (referring to Mr. Stanley), ask him if this sling of sugar was not as far from the boat as the height of this room. (To the interpreter.) Does he mean that?

A. What I mean to say is, that the sugar which was then placed on the landing, down to the boat, is as far

(Testimony of Naka.)

as from the floor to the ceiling, but the sling load at that particular time, was 3 or 4 feet away from the boat.

Q. Is it also true that when this sling load of sugar was 3 or 4 feet away from the boat these men stood up like that (counsel indicating the position by raising his hands full length over his head?)

A. That is approximately the height of the sugar at that time.

Mr. STANLEY.—With reference to that particular part of the boat, do you mean the edge of the boat?

A. He was standing in the boat and the depth of the boat in which Palapala was standing reached up to his waist.

Q. Half of his body was over the boat?

(Answer *omitted* in *original* certified transcript of record.)

Q. If it is true that Palapala was standing there with half of his body in the boat, and if it is also true that the sugar was 3 or 4 feet above the gunwale, and a big wave came along, how is it possible that that man's shoulder got hurt? Would it not shoot pass the boat?

A. While Palapala was standing in the boat a great big wave came in and lifted the boat up so that he was swung against the sling of sugar.

The COURT.—The sugar didn't strike him, he struck the sugar?

A. It was caused by the moving of the waves.

The COURT.—Did he strike the sling load of sugar, or did the sling load of sugar strike him?

(Testimony of Naka.)

A. The boat moved against the sling load of sugar.

The COURT.—Then he struck the sling of sugar, the sugar didn't strike him?

A. At that particular point I didn't see myself. I saw the boat move when Palapala was in the boat, against the sling of sugar.

The COURT (To the Interpreter).—Does he know anything of the matter from his own knowledge?

The INTERPRETER (After Speaking to the Witness).—He does.

The COURT.—Tell us just how the libelant was hurt, how he was hurt and anything he knows in any way; tell what he saw and what he knows and not what somebody told him.

A. What I said before was nothing but a true story.

The COURT.—I didn't say it was not a true story. I want him to tell his own story, and not what somebody else told him. Let us have it from the beginning.

A. My duty that day was to see to cover 10 bags into the boat in the sling. They lowered it into the boat. Those on the boat were receiving the bags of sugar, that I have lowered down. What I saw at that time, was the swell of the waves which caused the boat to move, and hit or strike against the sling of sugar that was hanging there.

The COURT.—That is all he saw? A. Yes.

The COURT.—Where did the sugar strike the libelant?

(Testimony of Naka.)

A. I think the sling of sugar struck the breast of the libelant.

Q. If it struck his breast—here is the sling load of sugar hanging here (indicating); a wave comes in, the wave causes the boat to move and this man is struck in the breast by the sugar, did he fall back?

A. The libelant did not fall back entirely, he was thrown backward, and thrown toward the head of the boat.

Q. At any time did he fall down into the bottom of the boat?

A. I saw him fall flat on the bottom of the boat.

Q. Was so that in place of getting struck the boat got hit, and was it not a streak of luck that he only broke his collar bone?

Mr. STANLEY.—We object to this.

(Objection overruled and exception noted.)

A. That was the only injury that Palapala received on the breast.

Q. Was it possible for half a ton of sugar that the boat was shoved against, goes slap against him, without most severely injuring him?

(Question objected to on the grounds that the witness did not know, that the only injury he saw was that which broke his collar bone.)

Redirect Examination.

(By Mr. STANLEY.)

Q. You said something about lowering sugar into the boat, how do you lower sugar into the boat?

(Testimony of Naka.)

A. I was attending to the sugar business down at Paauhau landing.

Q. You said you took it out of the car as it came to the landing, and put it into the sling, then your work is through. What part did you take in putting that sugar into the boat?

A. My business was to put the bags of sugar in the sling, and when that was done sometimes I was requested to do some other things.

Here ends the testimony of Naka.

Whereupon S. FUJIMOTO, a witness on behalf of the defendant, was called, sworn, and testified as follows:

Direct Examination.

(By Mr. STANLEY.)

Q. What is your name? A. S. Fujimoto.

Q. Where do you work? A. Paauhau.

Q. What is your business?

A. My work was to come down to the landing upon the arrival of any steamer.

Q. What do you do there?

A. My work was to attend to the freight of the steamer.

Q. Were you at that landing the day Palapala was hurt? This man (indicating the libelant).

A. I was.

Q. Did you see him get hurt?

A. I saw him injured in the shoulder (indicating the left shoulder).

Q. Explain what you saw.

(Testimony of S. Fujimoto.)

A. That day, the sea it was very rough that day. One other Japanese by the name of Tanaka was putting 10 bags of sugar in a sling; I was there at the time. Tanaka was lowering the sling of sugar down into the boat. It was up 4 or 5 feet above the boat, when I saw a big swell of wave come and strike the boat. The libelant Palapala was at that time preparing to receive the bags of sugar which were hanging over the boat, when the swell of waves came and moved the boat backwards and struck his shoulder against the sling of sugar. Just as soon as he struck himself against the sling of sugar, he was assisted by those in the boat, and was carried ashore.

Q. Carried ashore?

A. Carried ashore on the steamer.

Q. Where abouts on the body was he struck?

A. (Indicating the left breast.) The sling struck there, somewhere around here. About somewhere (indicating). I was on top of the landing, where I could see across.

Q. Was he struck on the breast?

(Question objected to as leading.)

Q. Do you know what injuries he received as a consequence of this blow? A. No, I do not.

Cross-Examination.

(By Mr. DUNNE.)

Q. I understand you testified that when this wave came along it moved the boat up, did the wave impart any other motion to that boat except to move it up?

A. That was all.

(Testimony of S. Fujimoto.)

Q. What was the position of Palapala at the time that, as you say, he was preparing to receive the sugar?

A. They were standing in the center of the boat when this swell of wave came up.

Q. Where were his arms, in what position?

A. I could not see.

Q. Did you have as good a view of this occurrence as Naka? A. I did.

Q. You say you could not see where his arms were. Did you see his arms extended up above his head?

A. I could not see.

Here ends the testimony of S. Fujimoto.

Whereupon, MANUEL ENOS, a witness on behalf of the defendant, was called.

The CLERK.—Do you speak English?

The WITNESS.—A little.

Mr. STANLEY.—I will ask that this man being Portuguese be permitted to use a Portuguese interpreter.

Mr. DUNNE.—Let us get along in English as long as we can.

The witness was duly sworn and testified as follows:

Direct Examination.

(By Mr. STANLEY.)

Q. Where were you born?

A. My country is Portugal.

Q. You are of Portuguese birth? A. Yes.

Q. You know how to speak your native tongue?

A. (No answer.)

(Testimony of Manuel Enos.)

Q. You speak Portuguese? A. Oh, yes.

Q. You cannot speak English well, only a little?

(Answer omitted in original certified transcript of record.)

Q. Do you prefer to speak Portuguese or English?

A. Portuguese.

Q. Do you wish to use an interpreter now?

A. I think it would be better.

Mr. STANLEY.—I move the Court that a Portuguese interpreter be sworn.

The COURT.—We don't need it yet.

(Exception noted to the ruling of the Court.)

Q. What is your occupation?

A. I do not know.

Q. What do you do for a living? A. I work.

Q. Where do you work?

A. Paauhau Plantation.

Q. What is your work there?

A. Working at the landing, the donkey.

Q. Are you the winchman? A. Yes, sir.

Q. How long have you been on the plantation?

A. Ten years, Paauhau.

Q. Will you describe what your duties are as winchman; tell us what your duties are as winchman?

The COURT.—Do you understand what he is saying to you? A. No, sir.

The COURT.—Do you wish to have Mr. Camara sworn?

Q. As winchman, what kind of work do you have to do? A. Let the sugar into the boat.

(Testimony of Manuel Enos.)

The COURT.—Swear Mr. Camara in as interpreter.

J. M. CAMARA was thereupon sworn to interpret from the English language into the Portuguese language, and from the Portuguese language into the English language.

Mr. DUNNE.—I would like to have the witness instructed that when he don't understand the question he ask the interpreter, but to use English as much as possible.

Q. What do you do as winchman?

A. Lower sugar into the boat.

Q. What is the first thing done with the sugar; when at the landing, what is the first thing done?

A. It is piled up on the landing, then it is put in a sling, and then it is pulled over the landing, then it is lowered down until it is as high as the boat.

Q. The first thing that is done is to hoist it up?

A. Yes.

Q. What is next?

A. Push the sugar over the landing.

Q. Off the landing?

A. Yes, I then lower it down.

The COURT.—You lower it into the boat?

A. No, sir.

Q. Where do you lower it?

A. To this high over the boat. (Indicating about $2\frac{1}{2}$ feet.)

Q. Afterward you lowered it into the boat?

A. I lower it to that height and when I get the signal I lower it further down.

(Testimony of Manuel Enos.)

Q. What guide have you to follow as to when you should raise or lower sugar?

A. After it gets to this height I do not lower it until I get the signal.

Q. Where do you get the signal?

A. From the boatman.

Q. What boatman?

A. Who ever happens to be in the boat.

Q. Do you remember when this man was hurt?

A. Yes.

Q. Where were you at that time?

A. I was in the donkey.

The COURT.—You were there when this man was hurt? A. Yes.

Q. Now, how was he hurt?

A. I had the sling about this high (indicating about two feet); a wave came and the sugar struck him against the boat.

Q. What part of the body did it strike him on?

A. Right here (indicating the chest).

Q. At the time that the sugar struck him, what were you doing? Just before it struck him, were you doing anything with the winch?

A. No, I had the sling stopped.

Q. After you stopped it there, did you do anything again with the sling until after the man was hurt?

A. No, sir.

Q. What became of the man when he had been struck with the sugar?

(Testimony of Manuel Enos.)

A. I pulled the sling up. Then the boy, he fell down in the boat.

Q. What was the condition of the weather that day?

A. Awful rough.

Q. What effect did that have on the boat?

A. A big wave came.

Q. Ordinarily, what effect would it have on the boat? (Interpreter here translates.)

A. Keep the boat in motion all the time.

Q. Do you know how many sling loads of sugar were got out to the steamer that day? A. No.

Q. What were the greatest number ever got out?

A. Six thousand five hundred.

Q. In one day? A. Yes, sir, the "Claudine."

Q. Do you know how many sling loads were being taken in a boat?

A. Some boats take 3 slings, other boats take 2.

Q. On that day? A. Yes.

Q. How is it in calm weather; how many sling loads would the boats take?

A. (Through the interpreter.) Four slings, sometimes five.

Q. Did you, as a matter of fact, let go this sling suddenly so that it fell on top of this man? A. No, sir.

Q. Did you let go at all— A. No, sir.

Q. After you had it stationery 4 feet above the boat?

A. No, sir.

(Testimony of Manuel Enos.)

Cross-Examination.

(By Mr. DUNNE.)

Q. Are you working at the plantation now?

A. Yes.

Q. What kind of work do you do?

A. I work on the landing, I go down to the dock when a steamer comes in.

Q. You have been ten years on the plantation?

A. Yes, sir.

Q. After you let the sugar part way down, you wait for a signal from the boatmen? A. Yes.

Q. Are they the proper persons to give this signal?

A. Yes.

Q. Nobody on the wharf had any business to give the signal?

(Objected to as immaterial, not proper cross-examination.)

The COURT.—I do not see anything wrong with the cross-examination. Go ahead.

Q. As I understand your testimony to be, this signal comes from the men in the boat and nobody else. That is correct— A. No, sir.

Q. You also said that people on the wharf had no business to give signals, the signals must come from the men in the boat? A. The men in the boat.

Q. The reason was because they are the men who receive the sugar?

A. Yes.

Q. Even if the captain of the steamer should try

(Testimony of Manuel Enos.)

to give the signal you could not obey without waiting for the signal from the men in the boat?

(Question objected to as not an issue in the case.)

The COURT.—The Court will let him go on.

Q. You have explained to us the way the signal was given. You say that nobody else had any business to give the signal to the men in the boat, because they were the people who take the sugar, and they know the proper time to receive it. I ask if the captain of the ship should attempt to give the signal, would you wait until you got a signal from the men in the boat?

A. Yes.

Q. You say the sea was awful rough? A. Yes.

Q. How did you know, did you see it? A. Yes.

Q. Where did you see it? A. From the donkey.

Q. From the donkey you could see when the weather was awful rough, could you? (Interpreter here translates.)

A. Yes.

Q. While you were in the well of the donkey, you could see the landing and you could see the waves coming in? A. Sometimes I could not see.

Q. Why not?

A. When the waves are close to the boat I cannot see.

Q. You can see when the weather is awful rough, you can see the waves coming in, can't you?

A. Sometimes I can see, and sometimes I don't. My

(Testimony of Manuel Enos.)

time is practically taken up with looking at the men in the boat.

Q. Suppose you look, can you see these waves come in? A. Suppose I look, yes.

Q. There was nothing to prevent your seeing if you want to; you can see if you want to? A. Yes.

Q. This winch is operated with a lever?

A. A lever.

Q. What starts the winch going?

A. The donkey.

Q. What do you take hold of? A. (No answer.)

Q. An iron bar? A. Yes.

Q. When you want the sugar to come down, you push it one way? A. Yes.

Q. When you want it to come up, you push it the other way, do you not? A. Yes.

Q. When this big wave came under the boat, how did it move the boat? A. This way (indicating).

Q. Toward the shore? A. Yes.

Q. When that wave passed what became of the boat?

A. The boat went up this way, under the fall with the sugar.

Q. Between the crest of two waves—you know that between two waves there is a hollow?

A. This was a big wave.

Q. Right behind this big wave was a depression, was there not?

A. (Through the interpreter.) When the wave

(Testimony of Manuel Enos.)

came it pushed the boat toward the landing. The man got hit the same time.

Q. After a wave comes up, does it leave the boat suspended in the air, or does it sink with the water?

A. (Through the interpreter.) It passed a little ways and went down.

Q. When the boat went down it was away below the sugar, was it not?

A. (Through the interpreter.) With the rising of the water the man got struck, and when the man got struck I hoisted up the sugar at the same time.

Q. After this big wave had passed, didn't the boat sink into the hollow?

The COURT.—He said it did.

Q. After it went down in that hollow, what is the reason of raising that sugar, when the boat was in the hollow?

A. I wanted to save them from getting hurt.

Q. Why didn't you hoist that sugar in the first place instead of waiting until this man got his collar-bone fractured? A. I didn't see this wave come up.

Q. Why didn't you see this wave come up?

A. I could not see it, I was watching the men in the boat.

Q. Didn't you go to work that day with the knowledge in you head that the weather was awful rough?

A. I could see it was rough.

Q. Did not you testify in so many words, that you

(Testimony of Manuel Enos.)

knew it was awful rough that day, because you saw it was awful rough that day?

A. I have got no right to say whether it was rough or not as to my work. I go to work in any weather.

Q. What I want to get at is, that when you went to work that day, you went to work with that knowledge in your mind, because you saw it was rough?

Mr. STANLEY.—He has already testified to that.

Q. Did anybody give you a signal to hoist that sugar up? A. Yes.

Q. Point out the man in these four (comprising the boat's crew with libelant) who signaled to you to hoist the sugar after this man got struck, identify him.

A. That fat man (indicating witness, named Bob Toka).

Q. You mean this man? (Indicating Bob Toka.)

A. Yes.

Q. When he signaled you to pull that sugar up again, how did he do it?

A. By that motion (indicating upward motion of both hands).

Q. By throwing up his hands? A. Yes.

Q. When he did that was there anything to prevent the other men in the boat from seeing Bob throw up his hands in that way?

A. I saw him make that signal. I do not know whether the other men saw it or not.

Q. I am asking you whether there was any physical

(Testimony of Manuel Enos.)

obstruction in or about that situation there, that prevented the other men in the boat seeing Bob make such a signal, if he made it? A. I do not know.

Q. Do you mean you do not know of anything that would have prevented the other men in the boat seeing the signal, if it was made, the signal you swore to?

A. There was nothing in the way to prevent them seeing the signal.

Q. Were there very many of these big waves?

A. Yes.

Q. They were coming in all the time? A. Yes.

Here ends the testimony of Manuel Enos.

(Here the Court ordered a recess until 1:30 P. M. today.)

Upon reconvening at 1:30 P. M. Dr. C. B. WOOD, a witness on behalf of the defendant, was called, sworn and testified as follows:

Direct Examination.

(By Mr. STANLEY.)

Q. What is your full name?

A. Clifford B. Wood.

Q. What is your profession?

A. Physician and surgeon.

Q. How long have you been practicing your profession? A. Twenty years.

Q. Of what institution are you a graduate?

(Testimony of Dr. C. B. Wood.)

A. Of the Chicago College of Physicians and Surgeons, 1883.

Q. And you have been engaged in active practice ever since? A. Yes.

Q. Have you had any hospital experience?

A. Eighteen months at Cook County Hospital, Chicago, as Resident Physician and 12 years, I think it is 12 years, here in Queen's Hospital.

Q. How long have you been here?

A. I came here in December, 1886.

Q. Do you know a man by name of Palapala?

A. Yes.

Q. When and where did you come to know him?

A. I examined him at the Queen's Hospital.

Q. When was that?

A. Wednesday morning, May the 6th.

Q. About what time?

A. About a quarter to nine.

Q. Was that before the trial?

A. It was Wednesday of this week.

Q. Who was present?

A. Dr. Cofer. He was the doctor through whom I got permission to see the patient. And it is possible that Dr. Sawyer was there part of the time. And possibly others, as the room is just off the veranda.

Q. Describe the examination you made.

A. I examined the right clavicle for fraction. I examined his shoulders and arms and had him remove his outer garments, his coat.

(Testimony of Dr. C. B. Wood.)

Q. In doing that which arm did he use?

A. Both arms and both hands.

Q. State what did you find upon examining him.

A. I found a newly united fracture of the right clavicle about the middle. I will state that I knew that the object of the examination I was making was to find out what his injury was for court purposes. I examined of course first the fracture itself, I found, as I stated, a newly united fracture. Then I conducted an examination with the object of finding if the union which had formed was strong enough to resist some force, and to what extent, if any, the usefulness of the limb was impaired at that time, whether he had some voluntary use of his arm, and if so, how much, the amount of pain he might have suffered from the injury to his arm and shoulders. And also the object of finding whether I could discover any complications outside the fracture.

Q. As a result of your examination what do you say as to the usefulness of his arm, that was fractured?

A. The right arm to be definite.

Q. The right arm?

A. He can use it some at present, but not to a great extent. He used it to remove his shirt; I did not ask him to use it for that purpose, but in my examination of him I tested the use of his arm for my own information.

Q. Describe your examination of him.

A. After examining the point of fracture, I then conducted an examination to see if the motion of that shoulder joint was limited, and if limited at all to ascer-

(Testimony of Dr. C. B. Wood.)

tain how much less than normal. I asked him to move his arm up over his head; around behind him; in front of him, and to raise it at his side, then to revolve it in a circular direction. I pressed his shoulder back from behind and asked him to swing the arm, which he did. In order to test the muscles of the arm I then took and put his arm in this position (indicating) the elbow half-flexed, and took hold of his arm and asked him to prevent my bending the elbow. I used so much force that I moved him around on the floor of the veranda. That is all the tests I put him to. I asked him if I was hurting him and if he had pain, and his answer was "No." I think I am right in saying that I asked him both ways, whether I was hurting him, and he said "No" and if he had pain in his arm, and he said "No." I think I asked him both questions in one breath, and he answered "No" to both questions at one time.

The COURT.—Go on.

A. That is the extent of the examination.

Q. In your opinion when would he be able to do all kinds of work as a sailor?

A. There is apparently a good union of his fracture. It is already seven weeks and more since the injury occurred. One month is sufficient and everything goes well. I think you add another month to the seven weeks, and he should be able to do sailor's work.

Q. In your opinion will the complete usefulness of the libelant's arm be interferred with in any way by the fracture?

(Testimony of Dr. C. B. Wood.)

A. I think not permanently. It will take time to get complete usefulness of the limb of course, but I think in time he will have perfect use of his arm.

Q. What is the time limit?

A. He might help some of his stiffness by rubbing the joints and by using the arm, that will help a great deal. If the muscles had not been used for a time they will become stiff, and will have to be exercised some, that will work off the stiffness. If he does that, beginning with light work and works it up to his former strength, I think it will be as good as before.

The COURT.—Is it a good thing for a man to have a bone broken?

A. No, Judge, but the clavicle is not a serious fracture.

The COURT.—I had my left arm out of joint, and it was over a year before I recovered.

A. I am talking of the collar bone, that is one of the bones from which we expect good results.

Q. The medical profession at large expect good results from a fracture of the collar bone. Would that fracture be simple or compound? A. Simple.

Q. Did you see anything in the case to lead you to believe that there were any complications?

A. I found no complications.

Q. Did you examine him for that, Doctor?

A. Yes.

Q. As a result of your examination, Doctor, did you

(Testimony of Dr. C. B. Wood.)

see anything to make you believe that there was tuberculosis, incipient tuberculosis?

A. Nothing to make me suspect it at all.

Q. What is the result of your examination? As I understand you, you did not see anything unusual in the injury there, that kind of a fracture.

A. Yes, I will answer it that way.

Q. You did not see anything to make you belive that he had neuralgia of the joint? A. I did not.

Q. Or no other unusual injury of the bone?

A. The bone was injured. I would not say it was an unusual injury, outside of it being a fracture of the clavicle itself. Whether that is usual or unusual is a question.

Q. When do you think, Doctor, he should be able to do light work?

The COURT.—That is not the test, it is his usual work.

Q. When should he be able to do work; scrubbing the decks of a steamer, polishing the brass on shipboard, and taking part in the watch of the ship?

A. He could use the muscles of his arm in some light way, in the way of exercise. First, I would want to find out how much use he is at present making of his arm. He has got to exercicse his arm some, in order to train his muscles up to heavy work.

Q. How long would it take before he could do light work?

(Testimony of Dr. C. B. Wood.)

A. He could start and see how much he can do, at any time. He could exercise that arm.

Q. The stiffness is due to what?

A. Take an arm or a shoulder that has been injured and bandaged tightly to the side, as I understand this was bandaged and kept there three weeks, and keep it in a sling a week or two more, if the arm does not pain him on the removal of the sling, there will be stiffness. It requires exercise to limber it up. If there was pain in the injured member it will take longer.

Q. Was there any evidence of a permanent injury?

A. A fracture of the clavicle is a permanent injury.

Q. Permanent injury to the usefulness of the limb, the arm, the right arm?

A. Nothing that leads me to believe or say that the usefulness of that arm would be sorely impaired.

Q. Is it not a fact that in the case of a simple fracture of the clavicle, the complete and unrestricted usefulness of the arm is not interfered with?

A. It is so stated in the text books, and that is my experience in uncomplicated fractures.

Cross-Examination.

(By Mr. DUNNE.)

Q. You stated that you came to see this man in the hospital. You did not ask him to do anything, as I understand it, in the manipulation of his arm?

A. Yes, sir, I asked him to remove his shirt.

Q. What character of movements of the arm—did you

(Testimony of Dr. C. B. Wood.)

experiment as to his lifting weights or anything of that kind? A. I did not.

Q. When you examined him, I understood you to say "that I knew what the examination was for, that it was going to be in court." Then you plunged off into something else.

A. I did not know that I did. I said that I did know what the examination was for, I simply wanted to clear up the fact that I examined Palapala for that purpose.

Q. Did you make any special examination for the purpose of discovering the presence or absence of incipient neuralgia of the joint? A. No.

Q. When you made an examination of him, did you make it for the purpose of discovering the presence or absence of incipient tuberculosis of the joint?

A. No, sir.

Q. Did you make any special test at that time of his cutaneous sensibility? A. No, sir.

Q. I understand you asked him very little?

A. Yes, very few questions.

Q. Do you remember what you did ask him?

A. I asked particularly about the pain.

Q. That was while moving his arm.

A. While I was moving his arm.

Q. You asked him and he said he had no pain, and you asked him if you were hurting him? A. Yes.

Q. Did not that have reference to the things being done there, at that time, and in that examination?

A. I should judge so.

(Testimony of Dr. C. B. Wood.)

Q. Now, you say you found no complications in this clavicle fracture, are you prepared to say there were none?

A. The complications I was looking for were the usual complications, such as injury to the blood vessels and nerves.

The COURT.—I was looking in one of the books last night, and it said where a man was hurt by a great weight falling on his chest. It was very difficult to diagnose the case, or to tell what effect it would have. I want you to be perfectly frank with the Court, and tell the Court what you think about it.

A. I should say if a great weight fell on one's chest—people have a habit of dating back to injuries of that kind all future results that may develop. Of course there may be internal injuries that will not be detected, or there may be injuries not detected in the examination.

Q. With reference to this examination, would it be possible to discover neuralgia or tuberculosis of the joint at a single examination, where there was no paroxysm of pain, what do you say?

A. There was no neuralgia. As far as tuberculosis is concerned in this case—I was not looking for special complications, I was looking for the ordinary complications. There might be a great many things that he might have had, that I did not look for in the examination. I would not undertake to say until I examined him for that point, that is if he had neuralgia or tuberculosis, or anything in that category.

(Testimony of Dr. C. B. Wood.)

Q. If it were true, that say a man sustained a fracture of the clavicle fifty days ago, let us say it was true, that the bandages were removed three weeks later, we will say that it is also true, that the pain incident to the original reception of the injury had ceased at the same time, or thereabouts, and a fresh or new and independent pain had made its appearance at the shoulder at the joint?

A. You mean in the shoulder joint.

Q. A cutaneous pain in or about the shoulder joint. Would you say if these facts were established, that it indicated a tubercular disease of the joint?

A. I would examine him further for a tubercular joint.

Q. Suppose you should find that it not only commenced shortly after the original traumatism, but that it was intermittent, would not that suggest to you, as a professional man, the presence of either tuberculosis or neuralgia?

A. Those two symptoms belong to neuralgia, intermittent and cutaneous. Any pain might be intermittent, especially as you didn't qualify as to whether there is or there is not motion.

Q. Is not neuralgia caused by injury to the nerves sometimes?

A. Any injury to the nerve might cause neuralgia.

Q. Suppose a man lies down in his bed and tries to go to sleep, rolls over and that pressure causes the pain to appear in or about the fracture in the shoulder, what would you say to that?

(Testimony of Dr. C. B. Wood.)

A. In the first place any pain is worse in the night. Pain is usually worse at night. It would pain him at night if it pained him at all. In the next place if one is asleep, and one has an injury in the joint, he is likely to hurt it by turning over or unconsciously moving around, especially if the joint has been out of use. Any movement which is beyond control, as in the case of sleep, naturally would give pain in a joint that had not been used, simply because the joint had not been used. Having pain at night, would not for that reason be worse under those circumstances.

Q. All these conditions I have referred to, neuralgia and tuberculosis, they are rather serious, are they not?

A. Tubercular joint is decidedly serious. It could not be more serious. As to neuralgia in any part of the body, it is harder to answer the question, because it is such an erratic disease. It might leave after treatment and it might not leave at all.

Q. Tuberculosis does sometimes result in losing the arm and also in death? A. It often does.

Q. Are there not cases of neuralgia of the joint where desperate measures are necessary.

A. There are extreme cases of neuralgia, in which such desperate measures as amputation are necessary. The patient can get no peace nor sleep, and something had to be done.

Redirect Examination.

(By Mr. STANLEY.)

Q. You have made no examination of the libelant, for either tuberculosis or neuralgia?

(Testimony of Dr. C. B. Wood.)

A. No.

Q. Will you make such an examination?

Mr. DUNNE.—We are agreeable, provided Dr. Humphris is present. Will the Court allow us a recess for that purpose?

The COURT.—The Court will not have a recess. You can go on with the examination of some other witness, and Dr. Wood and Dr. Humphris can make the examination.

Mr. STANLEY.—I will then withdraw Dr. Wood for the present.

Here ends the testimony of C. B. Wood for the time being.

Whereupon L. E. COFER, a witness on behalf of the defendant was called, sworn and testified as follows:

Direct Examination.

(By Mr. STANLEY.)

Q. What is your full name?

A. Leland E. Cofer.

Q. What is your profession?

A. Physician and surgeon.

Q. How long have you been a physician?

A. Since 1888.

Mr. DUNNE.—We will admit that he is qualified as a medical man to testify.

Q. What have you been doing for the past year?

A. General quarantine work for the United States

(Testimony of L. E. Cofer.)

Marine Hospital Service; medical officer in charge of the Marine Hospital Service for the Islands.

Q. Do you know a man by the name of Palapala?

A. Yes, I have seen him.

Q. How did you become acquainted with him?

A. Well, I went up to one of the wards four or five days ago and in looking them over I found this man there. I asked Dr. St. Claire and Mr. Eckhart why he was there, and they said he was recovering from a clavicle fracture. I made a cursory examination of him and found the man in good condition, so far as I could judge from the examination of that nature. The second time I saw him was when Dr. Wood informed me that he had been retained as an expert in connection with this man's case and said that he wanted the privilege of examining this man, which I readily granted. I did not examine him myself, but I saw Dr. Wood examine him. That is about all the connection I had with him. The next time I saw Dr. Sinclair I asked him about the case.

Q. You were present at the examination Dr. Wood made. A. Yes.

Q. Will you state the result of the examination he made at this time?

A. I simply saw in a general way what the condition of the man was. I believe I asked him at the time if he had any pain. There was apparently nothing the matter with him, but I intended to wait until the six weeks was up before giving him his discharge.

Q. When did you make this first examination?

(Testimony of L. E. Cofer.)

A. About four or five days before Dr. Wood made his examination. I do not remember the day exactly, that Dr. Wood examined him, but it was three or four days before that.

Q. That was the latter part of last week?

A. I cannot remember what day it was.

Q. But you are reasonably sure it was last week?

A. It was not more than five days before Dr. Wood's examination, it could not have been or I would not have been at the hospital.

Q. Describe the examination that Dr. Wood made?

A. As I remember it Dr. Wood told him to take off his shirt which the man did. Then he sounded both clavicles together, thumped them. Then he ran his finger along them. Then he extended the arm out and up over his head like this. (Indicating.) Then he took hold of his hand, his right hand, and with the arm flex, exerted pressure sufficient so that the man hall it around. Then I believe Dr. Wood asked him if he was hurting him and Dr. Wood asked him if he had any pain and the man said he didn't have any. I have forgotten exactly how he was asked. That is about all as far as I can recollect.

Q. From that examination what could you say as to whether or not the usefulness of the right arm would be impaired.

A. I think as to its usefulness that he has power to increase or prevent it by exercising it or not exercising it. In my opinion the arm could be used in the course of a month if the man would use his arm when he had a

(Testimony of L. E. Cofer.)

chance to do it. In that event he should have permanent recovery.

Q. How long would it take in your opinion?

A. Thirty days, provided he had a chance to get light exercise and provided he is willing to take advantage of it. If the man won't do it or is not willing to do it, if he feels that it is an invalid arm it will have some stiffness, precisely as a perfectly well arm would if kept in disuse.

Q. In your opinion if he exercises it as he should do, its usefulness should not be impaired after thirty days?

A. That is my opinion.

Q. In your opinion would he be able to do the ordinary work of a sailor in thirty days?

A. Yes, provided he starts in now with light work. He wants to have thirty days to do light work. If he is willing to do light work he should get his muscles in condition within that time.

Q. How soon would he be able to do light work as scrubbing the brasses?

A. I think he could start to-day, I think he could from the examination Dr. Wood made and the apparent strength that seemed to be in that arm and its mobility.

Q. Was this fracture a simple fracture or a compound fracture? A. Simple.

Q. Did you find any complications Doctor from your examination?

A. No, sir, no signs of complications.

Q. Was there any evidence of a permanent injury?

A. Any fracture will be a permanent injury because

(Testimony of L. E. Cofer.)

the bone will always be broken. In that sense it is permanent, but I think after thirty days providing he does light work, in order to get the muscles in training, that it will not be a permanent injury in that sense.

Q. Was there anything in your examination to lead you to suspect the presence of neuralgia or tuberculosis of the joint? A. No, sir.

Q. When was he discharged from the hospital?

A. I received a letter from Mr. Dunne the other afternoon in which he asked that he be given permission to attend Court. It happened that four or five days before Dr. Wood's examination of the arm, I had decided to have this man discharged, but I thought it was courtesy to wait until I could see Dr. Wilson, in whose charge the man was, and as soon as I saw Dr. Wilson I said "Dr. Wilson, you had better discharge that man." That afternoon or evening I received a letter from Mr. Dunne and I again saw Dr. Wilson and he said "I will discharge him now," that his time is practically up, which included six weeks from the twenty-fourth of March.

Q. What is the average time a man is laid up with a fracture of the clavicle?

A. In a fracture of the clavicle the man is received and we immediately put on a dressing and in twenty-eight to thirty days we take the dressing off. If we find a union and see nothing that indicates otherwise, we simply leave the dressings off four or five days, then we tell the patient to lift light chairs and finally make a bandage or a sling. In six weeks he is a discharged man if nothing goes wrong.

(Testimony of L. E. Cofer.)

Q. And in about a month or so you would think him ready for work?

A. Our regulations issued to us say not to keep a man in the hospital any longer than is absolutely necessary. We are not guided by the question of a man being able to earn a living beyond a certain point. If he is disabled we are supposed to keep him. Some fractures we have as long as three months.

The COURT.—This is a Government hospital?

A. Yes.

The COURT.—The Government pays the expenses?

A. Yes.

Cross-Examination.

(By Mr. DUNNE.)

Q. Tell me if you please whether or not while he was in the hospital under your observation, he was asked to lift objects with his arm? A. No, sir.

Q. You said that you saw nothing in his condition to justify you in suspecting the presence of tuberculosis of neuralgia of the joint. I will ask you if you are prepared to say that neither of those complications was present?

A. To ask if anything is not present is not fair. A medical man after seeing a man five weeks, paricularly when in the hospital and in bed, if neuralgia or tuberculosis appeared would expect a man to tell him so in the morning when he came around, but this man never said anything to either of the doctors who attended him and

(Testimony of L. E. Cofer.)

at the time I saw him he not only didn't say anything but denied having it.

Q. Did you make any special examination for neuralgia or tuberculosis? A. No.

Q. If it should turn out that after the original pain had ceased arising out of and by reason of the fracture, a new pain should appear about or in the shoulder joint, which should be cutaneous in character and intermittent in form, would you say that symptoms of that character indicated tuberculosis or neuralgia of the joint?

A. No, I would never think it was anything so serious as tuberculosis, but if he should state that the pain was intermittent and not steady I would have reason to believe and I would naturally think that it was neuralgia or else the ordinary muscular stiffness.

Q. What I want to get at is whether those conditions are consistent with neuralgia of the joint?

A. Well, not exactly in the joint. If it were only in the joint, I would want to know something about the pain and the amount of pain on pressure.

Q. If a case developed those symptoms would you say that it is not neuralgia?

A. No, I would not say that of course.

Q. Suppose this same patient of whom these things can be said, is examined and it developes that his temperature is 100½, that his pulse is over 100, and that the bone has receded from the joint, would you say that this pulse and this temperature would be consistent with tuberculosis?

(Testimony of L. E. Cofer.)

A. If not more consistent with neuralgia or torpid liver or something of that sort.

The COURT.—Does it mean that if a man has that temperature and that pulse there is something the matter. A. Yes, he might have a torpid liver.

Q. In your opinion would the symptoms described, justify a medical in cutting out of the case tuberculosis of the joint or neuralgia of the joint?

A. It would not. If you were asking that for witness stand purposes but in bedside work we would never think of it. We look at the practical side. If a man has that temperature it is clear that there is something the matter but we would not look for the worst. We would think that the liver needed attention. Consequently I answer it in two ways, first, as a witness, and second as at the bedside. A practitioner at the bedside would never think of answering that question in that way. He would not look for either tuberculosis or neuralgia of the joint but for a simpler cause first.

Redirect Examination.

(By Mr. STANLEY.)

Q. I understand that possibly these symptoms might arise from tuberculosis of the joint or neuralgia of the joint, but that such cases are rare and you don't think it probable.

A. I don't think I meant just that. I do say, however, that if it were a case of tuberculosis of the shoulder joint, I should expect to demonstrate more than the rise of temperature. I should expect pain in the joint

(Testimony of L. E. Cofer.)

before I could satisfy myself that the disease was tuberculosis. I should want to know the family history and other things. But after a mere cursory examination I would not talk seriously of the question of tuberculosis. I should try to attribute it to other little things first, having concomitant symptoms. To have tuberculosis, one must have temperature and pulse and pain on motion, those three things are perfectly consistent, but on the other hand they are consistent with other diseases.

Q. Would you feel yourself justified in saying that a man his either neuralgia or tuberculosis, when upon a cursory examination he exhibited the symptoms as described.

A. No, I not only would not say it but I would not think it. It is a question at the bedside as to what you think. That is the rule. My idea is that a man would not think of it, it is too rare and they are so many other things that are common.

Q. It would be something exceptionally rare to have tuberculosis develop from a simple fracture of the clavicle?

A. That could be better answered by Dr. Wilson or Dr. Sinclair who had charge of this particular case and know what is shows. I would rather not answer that question until after looking up the authorities. I cannot keep in my head the statistics necessary to answer that question.

(Testimony of Dr. C. B. Wood.)

Here ends the testimony of L. E. Cofer.

Whereupon Dr. C. B. WOOD, a witness on behalf of the defendant, was recalled, and testified as follows:

Direct Examination.

(By Mr. STANLEY.)

Q. Will you state the result of the examination?

A. I would say that I was called to examine the libelant and determine whether I found any symptoms of incipient tuberculosis or neuralgia of the joint. That is to say I made another special examination along those lines. As far as my own opinion is concerned, I should bar out neuralgia of the joint. Rather to the surprise of both of us he has a temperature of 100½ and a pulse which is over 100 which means he has some acute inflamatory trouble if he did not have the pulse and temperature previously. His *coat* is coated and reddened along the borders indicating digestive troubles, such as Dengue fever. What should be inferred from that pulse and that temperature, I am not willing to say on so short an examination. I re-examined the joint and I am satisfied he has not neuralgia. I saw no signs of tuberculosis with the single exception of the increased pulse and temperature and the apparent increased pain in moving the joint.

The COURT.—What is normal?

A. Ninety-eight and two-fifths to ninety-eight and three-fifths.

(Testimony of Dr. C. B. Wood.)

The COURT.—What would be the normal pulse?

A. The normal pulse?

The COURT.—For a man of his years?

A. The individuality also enters into it. Sometimes it gets down to 60 or 70 and sometimes as hight as 80. I believe the life insurance companies will not allow their examiners to pass a man whose pulse is over 84 to 86. They will have you examine him another day. I presume that an average would be 76 to 80.

The COURT.—What was this man's pulse?

A. Fifty odd beats in half a minute.

The COURT.—That is unusual?

A. It means fever.

The COURT.—Can a man have that pulse and that that temperaturet and be well? A. Oh, no.

Q. It might be Dengue?

A. Anything that produces fever would give that temperature and that pulse.

Q. If he is sick with the Dengue that will be determined shortly?

A. Forty-eight hours will clear the matter up.

Q. Are the diseases mentioned, neuralgia and tuberculosis, rare or otherwise?

A. If you mean by those diseases, as complications of a simple fracture of the clavicle, they are decidedly rare.

(Testimony of Dr. C. B. Wood.)

Cross-Examination.

(By Mr. DUNNE.)

Q. I notice you are very guarded in confining yourself to simple fracture of the clavical?

A. As in this case I mean.

Q. You must remember that the theory of this case, of both sides of the case is, that this man was struck with a sling load of sugar weighing 1,250 pounds, so that he was not struck merely as by a large man by the knocking down process. One of the consequences was that the clavicle was fractured. There is an *atromatism*. I will ask you if an *traumatism* of that kind might not be the cause of tuberculosis or neuralgia of the joint?

A. That is an entirely different question. Leaving out the fracture entirely. If you ask me if the result might be tuberculosis or neuralgia from any injury received to that point, by a sling of sugar bags falling on a man, is exceedingly rare, would say as to neuralgia it is exceedingly rare. I would say that tuberculosis might be the direct result of one of the results of that fall, but there must be the germs present to produce tuberculosis. The injury can only produce tuberculosis when the germs are not lacking.

Q. In a case of tuberculosis or neuralgia, is it not the practice of the medical profession to call an ordinary traumatism the cause?

A. Yes, if a man has tuberculosis and he has been injured, he will say that it is at that place that he

(Testimony of Dr. C. B. Wood.)

started to have tuberculosis. That is why people will tell you that they have tuberculosis in a joint and will date it from some accident which has occurred to them.

Here ends the testimony of C. B. Wood.

Whereupon C. L. WIGHT, a witness on behalf of the defendant, was called, sworn and testified as follows:

Direct Examination.

By Mr. STANLEY.)

Q. What is your position?

A. President of the Wilder Steamship Company.

Q. The Wilder Steamship Company is the employer of Palpala? A. Yes.

Q. You know him? A. Yes.

Q. Dr. Cofer has testified in this case that Palapala will be able to do light work like scrubbing decks, polishing brasses and keeping watch. I will ask you if the Wilder Steamship Company is willing to give this man work— the kind of work he is able to do in his present condition? A. Yes.

The COURT.—I suppose that is a matter provided in the contract. We cannot interfere with that.

No Cross-examination.

Here ends the testimony of C. L. Wight.

Here the defendant rested.

Whereupon BOB TOKA, a witness in rebuttal on behalf of the libelant, was recalled and testified as follows:

(Testimony of Bob Toka.)

Direct Examiation.

(By Mr. DUNNE.)

Q. It was testified to here by the winchman that after Palapala got struck he raised the sugar, but just before he raised the sugar he got a signal from you by your waving your hands to him to raise that sugar. I ask you did you or did you not give such a signal to that winchman at that time and place?

A. No, it is not so.

No cross-examination.

Here ends the testimony of Bob Toka.

Whereupon HINA, a witness on behalf of the libelant, was recalled in rebuttal and testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. The winchman says just before the sugar was hoisted up some signal was given by Bob by moving his hands, to raise that sugar and that nothing would prevent the men in the boat from seeing that signal. I ask you if you saw such a signal made?

A. I did not see any such signs.

No cross-examination.

Here ends the testimony of Hina.

Whereupon KEWIKI, a witness on behalf of the libelant, was recalled in rebuttal and testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. After the sugar struck Sam did you see Bob make

any signal to the winchman to raise that sugar up again? A. I never did.

No cross-examination.

Here ends the testimony of Kewiki.

Whereupon KIA, a witness on behalf of the libelant, was recalled in rebuttal and testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. Did you see Bob give any signal to the winchman to hoist that sugar after it struck Sam? A. No.

No cross-examination.

Here ends the testimony of Kia.

Whereupon Dr. F. H. HUMPHRIS, a witness on behalf of the libelant, was recalled in rebuttal and testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. I wish to ask you, Doctor, concerning this examination of the libelant which you made a few moments ago in connection with Dr. Wood. Will you kindly state the result of that examination?

A. Dr. Wood conducted the examination and I watched him. There was pain on deep pressure. Doctor placed his finger in the arm-pit, and we were both satisfied that there was pain.

Q. What else was observed?

A. He had increased pulse and temperature.

Q. What was his temperature?

(Testimony of Dr. F. H. Humphris.)

A. One hundred and one-half, two degrees of fever.

Q. The pulse? A. Over 100.

Q. Would you call that temperature and that pulse normal? A. Oh, no.

Q. In what respect was it abnormal?

A. It was two degrees of temperature above normal. The pulse is twenty beats, certainly too fast to the minute.

Q. From what you have observed in the case and what you saw just now, and knowing the history of the case, what would you say as to whether the symptoms are consistent with incipient tuberculosis?

A. They are.

Q. I will ask you whether a man exhibiting these conditions and symptoms would be recommended to go to work by any Christian physician?

A. I do not think so.

The COURT.—How much fever did you say he had?

A. Two degrees. The range of fever is only 8 degrees.

Q. Is this man an insurable risk?

A. He is not insurable in any company. His pulse and temperature would veto it.

The COURT.—Did the man appear to be sober?

A. Yes.

(Testimony of Dr. F. H. Humphris.)

Cross-Examination.

(By Mr. STANLEY.)

Q. No matter what caused the increased pulse and temperature, he should not be advised to work?

A. No.

Q. Those are symptoms of fever?

A. Those are symptoms of fever.

The COURT.—Could you tell what kind of fever?

A. No.

Q. If he has the Dengue, would you not be able to tell better in forty-eight hours, Doctor?

A. Much better. If he had incipient tuberculosis, a close watch might also show that.

Q. Possibly in a month it might all disappear?

A. Possibly, but he has not the symptoms of Dengue. He has no rash, no initial rash.

Q. Is it not a fact that the rash does not come until the fourth day?

A. The initial rash comes within twenty-four hours.

Q. As a rule?

A. I do not think so, so much in Honolulu.

Q. Is not the initial rash absent in Honolulu?

A. It often happens.

Q. The initial rash, as the disease prevails in Honolulu, is the exception?

A. I have said it was not the rule.

Here ends the testimony of Dr. F. H. Humphris.

Here the libelant rested in rebuttal.

Here ends the testimony of the above-entitled cause.

Counsel announced that they preferred to submit the case on brief without argument, and it was thereupon ordered by the Court that counsel be allowed until the following Wednesday, May 13th, to file their respective briefs.

The Court here ordered an adjournment until ten o'clock, Monday morning, May 11.

Here ends the transcript of the testimony taken and proceedings had of the above-entitled cause.

In the United States District Court, in and for the Territory of Hawaii.

IN ADMIRALTY.—Hon. MORRIS M. ESTEE, J.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU PLANTATION COMPANY
Defendant.
} No. 32.

Reporter's Certificate.

United States of America,
District of Hawaii.
} ss.

I, James D. Avery, Reporter of the United States District Court, for the Teritory of Hawaii, do hereby certify that the above and foregoing one hundred and seventy-four pages, numbered from one to one hundred and seventy-four, both inclusive, is a full, true and correct tran-

script of the testimony received and the proceedings had in the above-entitled cause upon the trial thereof.

JAMES D. AVERY,

Reporter, United States District Court, for the Territory of Hawaii.

[Endorsement]: Title of Court and Cause. Testimony. Filed July 2d, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

From Minutes U. S. District Court, page 353, Wednesday, May 20, 1903.

[Title of Court and Cause.]

Minute Entry as to Decree.

This case having been previously tried and submitted, and the Court being fully advised in the premises, this day rendered its written opinion herein ordering that a decree be entered in favor of the said libelant, Samuel Palapala, and against the said libelee in the full sum of $3,065.35, together with costs of this suit.

To which decision counsel for said libelee duly excepted.

In the United States District Court, in and for the Territory of Hawaii.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY (a Corporation),
Respondent.

J. J. Dunne, Esq., Proctor for Libelant.
Messrs. Holmes & Stanley, Proctors for Respondent.

Opinion.

This is a suit in admiralty, in personam, to recover the sum of $15,000 for personal injuries sustained by the libelant while engaged in loading a cargo of sugar into the American steamship "Helene."

The facts appear to be these: the libelant is a seaman on board of the steamship "Helene"; the respondent, the Paauhau Sugar Plantation Company, was at the time of the injury, and now is, a corporation organized under the laws of the State of California, and engaged in business in the Territory of Hawaii under the laws thereof. The said respondent operates a Sugar Plantation and wharf at Paauhau, on the Island of Hawaii, and sugar is shipped and discharged from said wharf into vessels afloat upon the navigable waters of the port of Paauhau.

On the afternoon of March 19, 1903, the date of the

injury complained of, the "Helene" was anchored in the port of Paauhau, to receive from said wharf certain sugar for transportation elsewhere; the master of said "Helene" ordered libelant to go with certain others of the crew to said wharf to get a load of sugar in one of several large boats belonging to the ship, used for that purpose; the libelant obeyed these orders; and, together with said crew, consisting of four men besides himself, namely, Kewiki, Toka; Kia and Hina, went from the "Helene" to the wharf; that the boat in which they were was not made fast to the wharf, but was kept in position with the oars, the surface of the wharf being considerably elevated above the surface of the boat; said wharf being some twenty-two and one-half feet above sea level.

The process by which the sugar was transferred from the wharf to the boat is admitted to be as follows:

"On said wharf there was a derrick so constructed as to be capable of being swung out over the edge of said wharf so that sugar hoisted thereby would be suspended over the water; attached to the upper end of this derrick was a block, and at its heel there was another block, and through these two blocks a wire fall was rove; at one end of this fall was attached a hook used to hoist the sling loads of sugar while the other end of said fall led to the steam winch which was used to hoist the sugar to the end of the derrick."

It appears, further, that when a sling load of sugar was hoisted to the end of the derrick, the said derrick was then swung out so that such sling load of sugar

would be over the water. It then became the duty of the winchman on the wharf to lower the said sling load of sugar part way down, and then hold it to await a signal from the crew in the boat, that signal notifying the winchman when to let the sugar descend into the boat.

All of the appliances, gear and machinery used in the operation of transferring the sugar belonged to the respondent, with the exception of the rope slings, in which the sugar was transferred from the wharf to the boat; these latter belonging to the steamship. But no complaint is made as to these rope slings having been defective, or as having contributed to the injury. The winch was in charge of an employee of the respondent.

On the day of the injury, it seems that a sling load of sugar was hoisted to the end of the derrick and suspended over the water, partly over the boat; the crew of which were endeavoring to so maneuver said boat as to place it in a proper position to receive said sling load. That while this was being done, said winchman let go the sling load of sugar containing some ten bags, of a gross weight of 1250 pounds, which precipitated the sugar suddenly into the boat, thereby striking the libelant, knocking him down, severely bruising him, and breaking his collar-bone.

The libelant was removed to the "Helene," and from there to the Plantation Hospital at Paauhau, where he remained for two days, and was then taken to the United States Division of the Queen's Hospital in Honolulu, where he remained from the 24th day of March,

1903, when the "Helene" reached Honolulu, until the 6th day of May undergoing treatment for his injuries.

The libelant was at the time of the injury some twenty-one years of age, a strong, healthy man, and earning $7.50 a week as seaman on board the "Helene." He has been unable to work at his vocation since the injury.

It is claimed by libelant that his injuries were the result of carelessness and negligence of the respondent, through the negligent act of the winchman, who suddenly, and without warning, let go the sling load of sugar before the crew in the boat had given the signal, in accordance with the established method, and before any signal of any kind had been given from the boat, and also by the careless and negligent manner in which the machinery and gear were set in motion by the said winchman.

While the respondent claims that after the sling load of sugar was suspended over the water, the winchman received a signal from the crew in the boat to lower the sling load part way down; that he did so, and held it there, awaiting a further signal to lower the sling load into the boat, when suddenly the boat was lifted up by a big wave toward the sugar, and the libelant was then struck and injured by coming in contact suddenly with the sling of sugar.

The injury is therefore undenied. Cause alone being disputed. The question then presented is, was the accident the result of the negligence of the winchman in letting go the sling load of sugar without notice from the crew in the boat, or was it the result of a big wave which

thrust the boat up towards the suspended sling load of sugar and thus caused the inury to the libelant?

It was the custom, as shown by the uncontradicted evidence in this case, for the man in charge of the winch on the wharf at Paauhau, to suspend the sling load of sugar over the boat which was to receive it, and hold it there until he got a signal from the crew in the boat that they were ready for the sugar, when he slowly lowered it into the boat, two of the crew usually "trimming" it in the technical language used, or steadying it gradually into place. This was done both before and after the accident on that day, as both Captain Nicholson of the "Helene," and Westoby, an employee of the respondent in charge of the landing at Paauhau, testified that about one thousand sacks of sugar were delivered aboard the "Helene" on that day, one sling load having been transferred before the accident occurred. Each of these sling loads contains ten sacks of one hundred and twenty-five pounds each, or a total of 1,250 pounds to the load.

That the business of transferring sugar from the landing at Paauhau to vessels lying out in the open sea is a dangerous one, because of the methods employed and the conditions surrounding the transaction is clear; and especially is this so when the weather is stormy and the sea consequently rough, rendering more than usual care necessary in the handling of the instrumentalities employed.

There seems to be considerable difference of opinion between libelant's witnesses and those of respondent as

to just how rough the sea was on the afternoon of March 19, 1903, when the accident occurred. Naka, one of the Japanese employees of the plantation, testified that "the sea was very rough . . . . with high waves, many of which came up on the landing, and wet the sugar." It is in evidence, uncontradicted, that the height of the landing is twenty-two and one-half feet above the surface of the water. If the testimony of this witness is correct, taken in connection with the admitted height of the landing above the sea, then the natural inference to be drawn is that these waves must have been at least 22½ feet in height in order to have wet the sugar lying upon the wharf.

Captain Nicholson of the "Helene," who stated that "the waves came up on the landing and the sugar got wet," and Westoby, in charge of the landing, who said that "the sea was very rough," both unite in testifying that on the afternoon of the accident, notwithstanding these enormous waves, about 1,000 sacks of sugar were loaded from the landing into these boats and discharged into the "Helene." This sugar must have been dry. Its commercial value would have been destroyed, at least temporarily, if wet with the salt water, or until it had been put through the milling processes again, which evidently was not done so far as these 1,000 sacks of sugar were concerned; although Westoby testified that if the sugar got wet, it had to be taken back to the mill again. I would seem if the waves had been of the character described, none of the sugar on the landing could have escaped a wetting.

The four men in the boat who had been engaged with libelant in the work of transferring this sugar, and who certainly of all people should know best about the character of the sea in which they were working, being in an open boat sustained in position only by the oars, all testified to the fact that while the weather had been rough in the forenoon, and possibly somewhat rough in the afternoon, as it was necessary to get out the canvas to cover the sugar to protect it from the salt spray, yet it was calm enough to work in the afternoon.

Hina, one of these boatmen, says: "It had been quite rough in the forenoon; but after lunch it was all right." Kiwiki, another of these men, testified as to the weather on that day that, "In the morning it was windy and rough, but in the afternoon it calmed down." Toka, also one of the boat's crew, said "The coast there is not always rough; on that day it was rough in the morning, but not in the afternoon; while Kia, the boat steerer, testified "The weather was calm enough for work; it was quite calm in the afternoon . . . . no time that afternoon did the waves interfere with the loading of the sugar."

It appears that the boat in which these men were working was about twelve or thirteen feet from the rocks on the shore. This was the testimony of Palapala, the libelant, and is uncontradicted. It would seem apparent, that if these waves were running twenty-two and a half feet high, that it would be an impossibility for the men to work in such a sea. The boat would have been in danger of being dashed to pieces on the rocks.

This fact seems to render more probable the testimony of the boat's crew as to the comparative smoothness of the sea, as the work was prosecuted both before and after the accident.

The winchman had knowledge that the sea was rough. He testified that the "weather was awful rough that day." He also stated that he "could see many big waves rolling in." He further testified that he suspended the sugar over the boat and while so suspended, that one of these big waves came and lifted up the boat which struck the sling load of sugar underneath and the accident resulted. This was practically the testimony of all the respondent's witnesses as to the cause of the accident, most of whom were at a distance, Westoby stating that he was 150 feet away, and Captain Nicholson that he sat on the deck of the "Helene" 350 feet away.

The winchman also testified that after the libelant was injured, he hoisted the sling load of sugar off from the unconscious body of libelant in response to a signal from the boat to do so. This he should have done either with or without a signal and it is immaterial whether he raised the sling voluntarily or in response to a signal. Westoby and Naka, testify that when the sling struck the libelant, he was standing up in the boat with his arms extended. This does not appeal to the common sense of the Court in view of the after effects. If the waves were as high as is insisted upon by the respondent's witnesses and this boat was being raised up against the sling load of sugar, it does not seem reasonable to suppose that the libelant would have deliberately placed himself in danger of being struck but would have instinctively avoided

or made some attempt to get out of the way of the danger. Such is the common experience of mankind. The instinct of self-preservation is strong in human nature and stands for proof of care. Allen vs. Willard, 57 Pa. St. 347; Cleveland & Pittsburg R. R. Co. vs. Rowan, et ux., 66 Id. 393; Thomas' Admx. etc. vs. The Delaware, Lackawanna & Western R. Co., 8 Fed. 729, 731. A person of ordinary intelligence will not purposely expose himself to danger. Cassidy vs. Angel, Town Treasurer etc., 12 R. I. 447.

But this testimony of Westoby and Naka is flatly contradicted by the crew in the boat and by Fujimoto, one of defendant's own witnesses and who testified that he saw the accident. The testimony of the crew is all to the point that no warning was given of the coming of the sugar, but that Palapala was straightening up after attempting to haul the canvas out from the bottom of the boat to cover the sugar placed there by the first sling load. It appears that this canvas is always carried for the purpose of protecting the sugar from the salt spray and the washing of the waves into the boat while the sugar is being transferred.

The libelant himself says, "just before the accident, I was fixing up the canvas to keep the sugar dry from the waves. As I stood up, I was struck. The canvas was not quite out then."

Kia the steerer said "That when he was struck, Palapala was on the starboard side of the boat working on this canvas."

Hina testified "that at the time of the accident, Palapala was still working on the first sling load trying to

cover it with the canvas. He got no warning that the sling load was coming. We did not expect it to fall."

Kewiki's testimony is to the same effect, while Bob Toka says "We gave no signal to lower sugar because we had to get the canvas that was under the first sling load. We had to get that canvas out before receiving another sling load."

The winchman testified on the stand that he took his signals for the final lowering of the sugar from the men in the boat who alone had the right to signal him, and that he took these signals from no other source. He does not claim to have received any signal whatever before the accident, which is in line with the testimony of libelant's witnesses, but states that the accident was unavoidable. in that while the sugar was suspended over the boat, awaiting the signal, the big wave came, the boat rose with the wave and struck the sling load of sugar from underneath, resulting in the injury to libelant. It is in proof that after the accident, the sling load of sugar was hoisted up again. Says Hina, "The sugar fell on him at the edge of the boat and when it was hoisted, he fell into the boat. He lay still he could not move."

So, too Kewiki says, "When the sugar struck him he gave a kind of grunt and then fell down in the boat. When the sugar was hoisted off of him he fell from the edge into the bottom of the boat."

It would seem that a necessity existed for the sling to be hoisted which is very significant. Even if, as contended by respondent those big waves had actually been running and one of them had lifted up the boat as argued, and the libelant had been lifted up in the boat on

this wave and had struck the sling load on the underside and thus had been injured, yet the same wave would have carried the boat past the sling load of sugar, which if held in position by the winchman, would have remained suspended even after its impact with the boat. But instead of this we find the sling load of sugar in the boat on top of the unconscious man, showing conclusively to my mind that the winchman had let go his hold of the sugar.

While I am constrained to think from the weight of the evidence, that the weather was not unusually stormy on that afternoon, yet even if there were high seas running these could have been seen by the winchman and he should have seen and guarded against them.

Westoby, who had been in charge of the landing for a little over a month, testified that he was familiar with the winch-house; that he had been in there and knew from personal experience, that the winchman could see the incoming waves; that he had himself seen them. The winchman stated that the weather was very rough on that day and that "he could see many big waves rolling in."

As was said by the Supreme Court of the State of California, in the case of Glascock vs. C. P. R. R. Co., 73 Cal. 137, 141:

"If he looked, he saw; and having age and faculties to understand the dangers, is charged with a knowledge of them, and was bound to act upon that knowledge as a prudent and cautious man would under the circumstances."

The winchman had entire control of the winch on the

landing, and could raise and lower the sling as he pleased. He was subject to orders from no one in relation to the lowering or raising of these slings of sugar, save the signals from the boat's crew when they were ready to receive the same. By the mere raising or lowering of a lever he could control the position of the sling load; and if the conditions of the accident were as claimed by respondent, it would have been but the work of a moment for the winchman to have raised the sling load out of the way of the boat and thus have avoided the accident, if he had exercised such vigilence as was encumbent upon him.

In the case of Schumacher vs. St. Louis Railway Co., 39 Fed. 174, the Court said that "The highest duty of man is to protect human life or the person of a human being. That duty is never performed so as to escape responsibility until all possible care under the circumstance is exercised."

In view of all the conditions surrounding the loading of this sugar, and with which the winchman was necessarily familiar, the responsibility on his part in prosecuting his portion of the work was made greater. If the danger increased by the stormy condition of the weather, then the greater the care required of the winchman in the exercise of his control over the machinery in his charge.

Says the Supreme Court of the United States in the case of Mather vs. Rillston, 156 U. S. P. 391, 398-9:

"Where the occupation is attended with danger to life, body or limb, it is encumbent upon the promoters thereof and the employers of others, thereon to take all rea-

sonable and needed precautions to secure safety to the persons engaged in their prosecution, and for any negligence in this respect from which injury follows to the persons engaged, the promoter or the employers may be held responsible and mulcted to the extent of the injury inflicted. . . . . Occupations, however important, which cannot be conducted without necessary danger to life, body or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards."

The Anchoria, 113 Fed. 982;

In re California Navigation and Improvement Co., 110 Id. 670.

After a careful consideration of all the testimony in the case. I am of opinion that the inujry was not caused by the boat being raised up on a big wave, but that it resulted from the careless and negligent act of the winchman in suddenly lowering the sling load of sugar without warning, and before any signal had been given from the man in the boat.

The winchman was an employee of the respondent engaged in the prosecution of its work, and as such employee, the respondent is charged with responsibility for his careless and negligent acts done in the course of his employment and resulting in the injury to libelant.

The amount of damages to be awarded is usually dependent upon the pain and suffering occasioned by the injury, the age, habits of life, and occupation of the libelant, his ability to earn, and the effect of the injury

upon all these things. Grant vs. Union Pacific Railway Co., 45 Fed. 673, 683.

The libelant was at the time of the injury twenty-one years of age, and a sound strong healthy man, with, so far as the evidence shows, no bad habits. As a result of the accident, his right clavicle or collar bone was broken, and he was otherwise severely bruised. He was for two days at the Plantation Hospital at Paauhau, and then removed to the United States Marine Division of the Queen's Hospital at Honolulu where he remained undergoing treatment for his injuries until the day before the commencement of the trial when he was discharged. He is not yet able to work, or to lift an object of any considerable weight, a serious proposition to a man following his vocation, that of a sailor in these island waters. While it appears that the bones have knit, and that libelant is able to move his shoulder, yet he suffers pain intermittently. Dr. Wood called for respondent, testified that he examined the libelant on May 6th, some weeks after the injury and that he found "a united fracture of the right clavicle"; but that the "libelant would not have perfect use of his arm for a considerable time." and that the fractured clavicle "is a permanent injury." He also stated that to be able to perform his work as a sailor, his muscles would have to be trained.

Dr. Cofer, also called for respondent, does not seem to have taken a very active part in the examination of libelant, stating that he looked on at Dr. Wood's examination, but in the main his testimony is corroborative of that of Dr. Wood, admitting however that "the fractured bone will never be as it was before." Dr. Humphris, as

it appears, examined the libelant on four different occasions, and testified that the injury was a very severe one, and stated that he believed the intermittent pain from which the libelant is suffering was due to the shoulder joint being in either a neuralgic or tubercular condition, inclining somewhat to the latter. Upon the trial an examination was made of the libelant by Dr. Wood on behalf of respondent and Dr.. Humphris of libelant, and as a result of this examination, a very serious condition was shown to exist. The pulse of the man was then one hundred, or twenty degrees above the normal, and his temperature indicated one hundred and a half, or two degrees of fever. Both doctors united in their testimony as to these facts. Dr. Wood stating that "there was something wrong with the man."

Something evidently must be wrong with the libelant; and in view of all the evidence in this case, and especially of the evidence as to the sound healthy condition of libelant previous to the accident, it is reasonable to suppose that his present condition is due to the injury resultant therefrom. Dr. Humphris stated that if the pain suffered by libelant in the shoulder joint is neuralgic, that it will be a considerable time before his earning capacity is restored; if the pain is due to a tubercular condition, often the result of the impact of a heavy body on the surface of a joint, then his capacity to earn his living as before the accident, can never be restored. Whether the joint is neuralgic or tubercular, was not made clear from the testimony of these physicians, but it is clear that the condition of said joint is not normal and that such condition was due to the injury. In any

event it is plain that his present and immediate future earning capacity is totally impaired.

I think libelant is entitled to a judgment, in addition to the amount of wages which he has lost since the date of the accident, in such a sum as will compensate him for the injury and suffering consequent thereon. I will therefore award him the sum of three thousand dollars in full of all damages for the injury, and the further sum of $65.35 being the amount he would have earned as wages between the 19th day of March, 1903, and the date hereof, making a total of $3,065.35, together with costs of suit.

ESTEE,
Judge.

May 20th, 1903.

Let judgment be entered accordingly.

[Endorsed]: Title of Court and Cause. Court's Opinion. Filed May 20th, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States, in and for the District of Hawaii.

IN ADMIRALTY.—LIBEL IN PERSONAM.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY (a Corporation),
Defendant.

Decree.

At a regular term of the District Court of the United States of America, for the District of Hawaii, held at the courtroom of said Court in the Judiciary Building in the city of Honolulu, in said District on Wednesday, the 20th day of May, in the year of our Lord one thousand nine hundred and three. Present: The Honorable M. M. ESTEE, District Judge.

And now, to wit, on this Wednesday, the 20th day of May, A. D. 1903, this above-entitled cause having been heard on the pleadings and proof, and after briefs had been filed by the advocates of the respective parties, and due deliberation being had thereon the Court finds that the above-named libelant is entitled to recover therein, and the Court having found and assessed the amount of said libelant's damage and recovery herein at the sum of three thousand and sixty and 35/100 dollars ($3,065.35) in lawful money of the United States:

Now, therefore, on motion and application of J. J. Dunne, Esq., proctor for said libelant,

It is hereby ordered, adjudged and decreed that Samuel Palapala, the above-named libelant, have and recover of and from said Paauhau Sugar Plantation Company, a corporation, said defendant, and that said Paauhau Sugar Plantation Company, a corporation, said defendant, pay to said Samuel Palapal, said libelant, the full sum of three thousand and sixty-five and 35/100 dollars ($3,065.35), in lawful money of the United States, together with the costs and disbursements of said libelant in the above-entitled cause hereafter to be taxed.

Given, made and dated at Honolulu, Hawaii, this 20th day of May, A. D., 1903.

MORRIS M. ESTEE,
Judge of said Court.

The above decree is hereby approved as to form.

HOLMES & STANLEY,
Proctors for said Defendant.

Entered May 20th, 1903, in Judgment and Decree, Book I. page 143.

In the District Court of the United States, in and for the Territory of Hawaii.

IN ADMIRALTY.

SAMUEL PALAPALA,

Libelant,

vs.

PAAUHAU SUGAR PLANTATION COMPANY,

Defendant.

Stipulation as to Execution on Decree.

It is hereby stipulated by and between J. J. Dunne, Esq., counsel or libelant, and Merssrs. Holmes & Stanley, counsel for defendant, that execution on the decree in the above-entitled cause shall not be sued out prior to the 25th day of June, 1903.

Honolulu, June 1st, 1903.

J. J. DUNNE,
Counsel for Libelant.

HOLMES & STANLEY,
Counsel for Defendant.

[Endorsed]: Title of Court and Cause. Stipulation. Filed June 1st, 1903. W. B. Maling. Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States of America, in and for the Territory of Hawaii.

IN ADMIRALTY.—LIBEL IN PERSONAM.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY (a Corporation),
Defendant.

Stipulation as to Execution on Decree.

It is hereby stipulated and agreed by and between J. J. Dunne, Esq., counsel for the libelant, and Messrs. Holmes & Stanley, counsel for the defendant, Paauhau Sugar Plantation Company, that execution shall not issue on the final decree entered in the above-entitled cause on the 22d day of May, 1903, on or before the 2d day of July, 1903.

Dated June 24th, 1903.

J. J. DUNNE,
Counsel for Libelant.

HOLMES & STANLEY,
Counsel for Defendant, Paauhau Sugar Plantation Company.

[Endored]: Title of Court and Cause. Stipulation. Filed June 24th, 1903. W. B. Maling, Clerk.

In the District Court of the United States of America, in and for the Territory of Hawaii.

IN ADMIRALTY.—LIBEL IN PERSONAM.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION Company (a Corporation),
Defendant.

Stipulation as to Execution on Decree.

It is hereby stipulated and agreed by and between J. J. Dunne, Esq., counsel for the libelant, and Messrs. Holmes & Stanley, counsel for the defendant, Paauhau Sugar Plantation Company that execution shall not issue on the final decree entered in the above-entitled cause on the 22d day of May, 1903, on or before the 9th day of July, 1903.

Dated July 2d, 1903.

J. J. DUNNE,
Counsel for Libelant.

HOLMES & STANLEY,
Counsel for Defendant, Paauhau Sugar Plantation Company.

[Endored]: Title of Court and Cause. Stipulation. Filed July 2d, 1903. W. B. Maling, Clerk.

In the District Court of the United States, in and for the Territory of Hawaii.

IN ADMIRALTY.—LIBEL IN PERSONAM.

SAMUEL PALAPALA,
Libelant
vs.
PAAUHAU SUGAR PLANTATION COMPANY,
Respondent.

Notice of Appeal.

To Samuel Palapala, Libelant, and J. J. Dunne, Esq., His Proctor.

You and each of you are hereby notified that the respondent in the above-entitled cause intends to and hereby does appeal from the final order and decree of the District Court of the United States in and for the Territory of Hawaii, entered in the above-entitled cause on the 20th day of May, 1903, to the United States Circuit Court of Appeals for the Ninth Circuit, and you are further notified that the respondent intends to introduce new proofs on appeal.

Done at Honolulu, T. H., July 8th, 1903.

HOLMES & STANLEY,
Proctors for Paauhau Sugar Plantation Company.

Service of a copy of within notice of appeal, acknowledged this 8th day of July, 1903.

J. J. DUNNE,
Proctor for Samuel Palapala, Libelant,

[Endorsed]: Title of Court and Cause. Notice of Appeal. Filed July 15, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States, in and for the Territory of Hawaii.

IN ADMIRALTY.—LIBEL IN PERSONAM.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY (a Corporation),
Respondent.

Assignment of Errors.

Now comes the above-named respondent in the above-entitled cause, appellant herein, and says that in the record and proceedings in the above-entitled matter there is manifest error, and said respondent, appellant herein, now makes files and presents the following assignment of errors upon which it will rely, as follows, to wit:

1. Said Court erred in holding and deciding herein that "the libelant was at the time of the injury some twenty-one years of age," it being disclosed by the evidence that the libelant was at the time of the rendition and entry of the final order and decree herein under the age of twenty-one years.

2. Said Court erred in holding and deciding herein

that the winchman, an employee of the respondent, was at the time of the injury to the libelant, to wit, on the 19th day of March, 1903, guilty of carelessness and negligence and that the injury to the libelant resulted from such carelessness and negligence.

3. Said Court erred in holding and deciding that the abnormal pulse and temperature of the libelant and the condition of his health during the progress of the trial, and more particularly on the 10th day of May, 1903, was due to the injury received by the libelant on the 19th day of March, 1903.

4. Said Court erred in holding and deciding that the condition of the shoulder joint was not normal at the time of the trial of the above-entitled cause and that its condition was due to the injury received by him on the 19th day of March, 1903.

5. Said Court erred in holding and deciding that the present and immediate future earning capacity of the libelant was totally impaired.

6. Said Court erred in holding and deciding that under the facts of the case as disclosed by the evidence the libelant was entitled to recover damages from the respondent, and in not holding and deciding that the winchman, an employee of the respondent was not guilty of carelessness and negligence on the 19th day of March, 1903, at the tlme when the libelant was injured and that libelant was not entitled to recover any sum whatever from the respondent.

7. Said Court erred in holding and deciding that the libelant was entitled to recover from the respondent

the sum of three thousand dollars in full of all damages for the injury complained of, and the further sum of sixty-three dollars and thirty-five cents as wages, on the ground that the said sums are and each of them is excessive.

8. Said Court erred in making, rendering and entering its decree on March 20th, 1903, that the libelant recover of the respondent damages in the sum of $3,065.35, together with costs of suit, on the ground that the award to the libelant of the said sum of $3,065.35 made in and by the said decree was and is excessive.

9. Said Court erred in making, rendering and entering its decree in the said action because said decree was and is contrary to law and to the facts as stated in the pleadings and record in said action.

10. Said Court erred in not making, rendering and enterisg a final decree in the above-entitled action in favor of said respondent.

In order that the foregoing assignment of errors may be and appear of record, said respondent, appellant herein, files and presents the same to said Court, and prays that such disposition be made thereof as is in accordance with law and the statutes of the United States in such cases made and provided; and said respondent, appellant herein, prays a reversal of the above-mentioned decree heretofore made and entered by said Court.

Dated Honolulu, Hawaii, July 8th, 1903.

PAAUHAU SUGAR PLANTATION COMPANY.

By Its Proctors,

HOLMES & STANLEY.

HOLMES & STANLEY,

Proctors for Respondent.

Due service of the within assignment of errors is hereby admitted, and receipt of a copy thereof acknowledged, this 8th day of July, 1903.

J. J. DUNNE,

Proctor for Libelant.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed July 15, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States, in and for the Territory of Hawaii.

IN ADMIRALTY.—LIBEL IN PERSONAM.

SAMUEL PALAPALA,

Libelant,

vs.

PAAUHAU SUGAR PLANTATION COMPANY,

Respondent.

Petition for Allowance of Appeal.

To the Honorable Morris M. Estee, Judge of the District Court of the United States in and for the Territory of Hawaii.

The above-named respondent conceiving itself aggrieved by the order and decree made and entered in the above-entitled cause on the 20th day of May, 1903, does hereby appeal from the said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and having filed with the clerk of the District Court of the United States in and for the Territory of Hawaii, prays that this appeal may be allowed and that a transcript of the record, papers and proceedings upon the said order and decree as made, duly authenticated, may be sent to the United States Court of Appeals for the Ninth Circuit; and also that an order may be made fixing the amount of security which the defendant shall give and furnish upon such appeal, and upon the giving of such security all further proceedings in this Court be superceded and stayed until the determination of the said appeal by the said United States Circuit Court of Appeals for the Ninth Circuit.

PAAUHAU SUGAR PLANTATION COMPANY,

By Its Attorneys,

HOLMES & STANLEY.

Dated July 8th, 1903.

Service of a copy of the within petition for allowance of appeal acknowledged this 8th day of July, 1903.

J. J. DUNNE,

Proctor for Libelant.

[Endorsed]: Title of Court and Cause. Petition for Allowance of Appeal. Filed July 15, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the United States District Court, in and for the Territory of Hawaii.

IN ADMIRALTY.—LIBEL IN PERSONAM.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY,
Respondent.

Order Allowing Appeal.

Upon motion of Messrs. Holmes & Stanley, proctors for respondent, and on filing petition of Paauhau Sugar Plantation Company, respondent, for order allowing appeal, together with an assignment of errors—

It is hereby ordered that an appeal be, and hereby is, allowed to the United States Circuit Court of Appeals for the Ninth Circuit, from the final order and decree made and entered in the above-entitled cause on the 20th day of May, 1903; that the amount of the bond upon said appeal be and hereby is fixed at the sum of $5,000, and that a certified copy of the record and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

Dated July 15th, 1903.

MORRIS M. ESTEE,
Judge of the District Court of the United States, in and for the Territory of Hawaii.

Due service of the within order allowing appeal is hereby admitted and receipt of a copy thereof acknowledged this 15th day of July, 1903.

J. J. DUNNE,
Proctor for S. Palapala, Libelant.

[Endorsed]: Title of Court and Cause. Order Allowing Appeal. Filed July 15th, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

From Minutes U. S. District Court, page 441, Wednesday, July 15, 1903.

[Title of Court and Cause.]

Order Fixing Amount of Bond.

Upon motion of Messrs. Holmes & Stanley, proctors for respondent, and on filing petition of Paauhau Sugar Plantation Company, respondent, for order allowing appeal, together with an assignment of errors, it is hereby ordered that an appeal be and hereby is allowed to the United States Circuit Court of Appeals for the Ninth Circuit, from the final order and decree made and entered in the above-entitled cause on the 20th day of May, 1903; that the amount of the bond upon said appeal be and hereby is fixed at the sum of $5,000, and that a certified copy of the record and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

In the District Court of the United States, in and for the Territory of Hawaii.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY (a Corporation),
Respondent.

Bond for Costs on Appeal.

Know all men by these presents, that we, Paauhau Sugar Plantation Company, a corporation, as principal, and A. C. Lovekin and H. M. Whitney, Jr., as sureties, are held and firmly bound unto Samuel Palapala libelant in the above-entitled cause in the full and just sum of two hundred and fifty dollars, to be paid to the said Samuel Palapala, his attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the 17th day of July, A. D. 1903.

Whereas, lately at a session of the District Court of the United States, for the Territory of Hawaii, in a suit depending in said court between Samuel Palapala, libelant, and the Paauhau Sugar Plantation Company, a corporation, respondent, a decree was rendered against the said Paauhau Sugar Plantation Company, and the said Paauhau Sugar Plantation Company having ob-

tained from said Court an order allowing an appeal, to reverse the decree rendered in the aforesaid court, and a citation directed to the said Samuel Palapala, libelant, is about to be issued citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the 5th day of October next.

Now, the condition of the above obligation is such that if the said Paauhau Sugar Plantation Company shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its appeal good, then the above obligation shall be void; otherwise, the same shall remain in full force and effect.

PAAUHAU SUGAR PLANT. CO.,
By Its Atty. in Fact,
W. M. GIFFARD,
H. M. WHITNEY, Jr.,
A. C. LOVEKIN.

The foregoing bond may be approved as to form, amount and sufficiency of sureties.

J. J. DUNNE,
Proctor for Samuel Palapala, Libelant.

United States of America,
Territory of Hawai.. } ss.

H. M. Whitney, Jr., and A. C. Lovekin, being duly sworn, deposes and says, each for himself, that he is a resident freeholder in said Territory; that he is worth the sum of $250 over and above all his just debts and

liabilities; and that his property is situate in said Territory and subject to execution.

H. M. WHITNEY, Jr.

A. C. LOVEKIN.

Sworn to this 17th day of July, 1903, before me.

[Seal] H. C. CARTER,

Notary Public, First Judicial Circuit.

The within bond is approved as to form, amount and sufficiency of sureties.

July 17th, 1903. MORRIS M. ESTEE,

United States District Judge.

Due service of the within bond on appeal is hereby admitted and receipt of a copy thereof acknowledged this 17th day of July, 1903.

J. J. DUNNE,

Proctor for Samuel Palapala, Libelant.

[Endorsed]: Title of Court and Cause. Bond for Costs. Filed July 18th, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States, in and for the Territory of Hawaii.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY (a Corporation),
Respondent.

Bond on Appeal.

Know all men by these presents, that we, Paauhau Sugar Plantation Company, a corporation, as principal, and A. C. Lovekin and H. M. Whitney, Jr., as sureties, are held and firmly bound unto Samuel Palapala libelant in the above-entitled cause, in the full and just sum of five thousand dollars, to be paid to the said Samuel Palapala, his attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of July, A. D. 1903.

Whereas, lately at a session of the District Court of the United States, for the Territory of Hawaii, in a suit depending in said court between Samuel Palapala, libelant, and the Paauhau Sugar Plantation Company, a corporation, a respondent, a decree was rendered against the said Paauhau Sugar Plantation Company, and the said Paauhau Sugar Plantation Company having ob-

tained from said Court an order allowing an appeal, to reverse the decree rendered in the aforesaid court, and a citation directed to the said Samuel Palapala, libelant, is about to be issued citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the 5th day of October next.

Now the condition of the above obligation is such that if the said Paauhau Sugar Plantation Company shall prosecute its said appeal to effect and shall answer all damages and costs that may be awarded against it if it fails to make its appeal good, and shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit in the said cause, or on the mandate of said United States Circuit Court of Appeals by the Court below, then the obligation shall be void; otherwise the same shall remain in full force and effect.

PAAUHAU SUGAR PLANT. CO.,
By Its Atty. in Fact.
W. M. GIFFARD,
H. M. WHITNEY, Jr.,
A. C. LOVEKIN.

The foregoing bond may be approved as to form, amount and sufficiency of sureties.

J. J. DUNNE,
Proctor for Samuel Palapala, Libelant.

United States of America,
Territory of Hawai.. } ss.

H. M. Whitney, Jr., and A. C. Lovekin, being duly sworn, deposes and says, each for himself, that he is a resident freeholder in said Territory; that he is worth the sum of $5000 over and above all his just debts and liabilities; and that his property is situate in said Territory and subject to execution.

H. M. WHITNEY, Jr.
A. C. LOVEKIN.

Sworn to this 17th day of July, 1903, before me.

[Seal] H. C. CARTER,
Notary Public, First Judicial Circuit.

The within bond is approved as to form, amount and sufficiency of sureties.

July 17th, 1903.

MORRIS M. ESTEE,
United States District Judge.

Due service of the within bond on appeal is hereby admitted and receipt of a copy thereof acknowledged this 17th day of July, 1903.

J. J. DUNNE,
Proctor for Samuel Palapala, Libelant.

[Endorsed]: Title of Court and Cause. Bond on Appeal. Filed July 18th, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

From Minutes U. S. District Court, page 444, Saturday, July 18th, 1903.

[Title of Court and Cause.]

Order Approving Bond on Appeal and Cost Bond.

Now comes proctor for the said libelee and presents in court its bond on appeal and cost bond, which said bonds are approved by the Court, and thereupon the citation on appeal is signed by the Court.

In the District Court of the United States, in and for the Territory and District of Hawaii.

United States of America,
Territory of Hawaii. ss.

Clerk's Certificate to Transcript.

I, Walter B. Maling, Clerk of the District Court of the United States for the Territory of Hawaii, do hereby certify that the foregoing pages, numbered from 1 to 255, inclusive, is a true and complete transcript of the record and proceedings had in said Court in the cause of Samuel Palapala vs. Paauhau Sugar Plantation Company, as the same remains of record and on file in my office, and I further certify that I hereto annex the original citation on appeal in said cause.

I further certify that the cost of the foregoing transcript of record is $98.30, and that said amount was paid by appellant.

In testimony whereof, I have hereunto set my hand and

affixed the seal of said Court this 11th day of August, A. D. 1903.

[Seal] WALTER B. MALING,
Clerk.

In the District Court of the United States, in and for the Territory of Hawaii.

IN ADMIRALTY.—LIBEL IN PERSONAM.

SAMUEL PALAPALA,
Libelant,
vs.
PAAUHAU SUGAR PLANTATION COMPANY, (a Corporation),
Respondent.

Citation.

United States of America,
District of Hawaii. } ss.

The President of the United States, to Samuel Palapala, Libelant, Above-named, and to J. J. Dunne, Esq., His Proctor, Greeting:

You, and each of you, are hereby cited and admonished to appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 5th day of October, 1903, pursuant to an appeal filed in the office of the clerk of the United States District Court for the Territory and District of Hawaii, in the above-entitled pro-

ceeding, wherein the above-named Paauhau Sugar Plantation Company is respondent, and you are libelant, to show cause, if any there be, why the decree entered in the above-entitled proceeding on May 20th, 1903, in said appeal mentioned and thereby appealed from, should not be corrected and reversed, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 18th day of July, 1903.

MORRIS M. ESTEE,
Judge.

Due service of the within citation is hereby admitted, and receipt of a copy thereof acknowledged this 17th day of July, 1903.

J. J. DUNNE,
Proctor for Libelant.

[Endorsed]: No. 32. Dis. Court U. S. Ter. of Haw. In Admiralty. Samuel Palapala vs. Paauhau Sugar Plant. Co. Libel in Personam. Citation. Filed July 18th, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

[Endorsed.] No. 981. In the United States Circuit Court of Appeals for the Ninth Circuit. Paauhau Sugar Plantation Company (a Corporation), Appellant, vs. Samuel Palapala, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Hawaii. Filed August 17, 1903.

F. D. MONCKTON,
Clerk.

No. 981.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

In Admiralty.

PAAUHAU SUGAR PLANTATION COMPANY, (A CORPORATION),
Appellant,

vs.

SAMUEL PALAPALA,
Appellee.

Upon Appeal from the United States District Court for the District of Hawaii.

ARGUMENT AND BRIEF FOR APPELLANT, FILED PURSUANT TO STIPULATION BETWEEN COUNSEL.

HOLMES & STANLEY,
MORRISON & COPE,
Proctors for Appellant.

CHARLES B. MARX,
R. D. SILLIMAN,
Of Counsel.

THE MURDOCK PRESS, S. F.

No. 981.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In Admiralty.

PAAUHAU SUGAR PLANTATION COMPANY, (A CORPORATION),
Appellant,

vs.

SAMUEL PALAPALA,
Appellee.

Upon Appeal from the United States District Court for the District of Hawaii.

ARGUMENT AND BRIEF FOR APPELLANT, FILED PURSUANT TO STIPULATION BETWEEN COUNSEL.

In this brief, filed on behalf of the appellant, three questions will be discussed, namely:—

1. Does the record show that the appellant is chargeable with negligence because of the manner in which

its appliances for handling sugar were handled at the time the appellee was injured?

2. Was not the accident in fact caused by the negligence of the appellee and his fellow servants?

3. If the court shall find that the record discloses actionable negligence on the part of the appellant, should not an order for taking further testimony in this court be made before attempting to fix the amount of damages to be awarded?

The last question will not require an answer if either of the first two are answered in favor of the appellant.

The propositions stated are fully covered by the assignments of error. (See assignments of error 2, 5, 6, 7, 8, 9, and 10, Transcript, 257-258.)

I.

THE RECORD DOES NOT SHOW NEGLIGENCE ON THE PART OF THE APPELLANT OR OF ANY OF ITS SERVANTS.

The appellant owns and conducts a sugar plantation upon the windward side of the Island of Hawaii, and has a wharf or landing at Paauhau. Ships are not able to come alongside of said landing, nor are the ships' boats able to do so, but the bags of sugar, ten at a time, are lowered by a derrick into boats which are kept in position a few feet away from the landing by the use of oars. The bags of sugar are bound with a rope or sling on the wharf, are raised slightly and swung out over the water; there they are held until the men in the

boat want them lowered, when, upon signal from the men in the boat they are let down and guided to the desired position by two sailors, who have no other duty to perform than to so assist in the loading. (Transcript, 50, 56, 69, 71, 72, 91.)

The appellee, Palapala, was one of these attendants. (Transcript, 91.) The derrick was manipulated by a man who is described in the record as a "winchman," who occupies an elevated position from which he can plainly see the boat below. (Transcript, 46.)

Early in the afternoon of March 19, 1903, the steamer "Helene," belonging to the Wilder Steamship Company, the employer of the appellee, sent her boats to receive a cargo of sugar from the appellant for transportation. One of these boats received a load and departed for the ship; another, the one on which the appellee was employed, had received one "sling-load" of sugar and was in the act of receiving a second when the appellee was hurt. The contention of the appellee upon the trial was, that the injury was caused by the rapid and unauthorized lowering of the sugar by the "winchman."

It is the determination of just what occurred at this particular point of time, and the definite ascertainment of the true cause of the injury, that must determine whether or not the appellant shall be held responsible

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NOTE.—(When not italicised references are to testimony of witnesses called by appellee).

for the injuries sustained by the appellee, and it is just here that the testimony adduced in behalf of the appellee is vague and contradictory, while the general conclusion of the witnesses, to the effect that the injury was caused by the rapid and unauthorized lowering of the sling-load by the winchman is clearly refuted in each instance by the witness's own testimony as to his position and ability to see, or by what he actually saw or failed to see, and what he did. Upon this crucial point of the case, the testimony of each witness called by the libelant, the appellee, on the direct, consists of one or two mere generalities. And not only is this so, but it will be found that several of the witnesses were interrupted in their attempt to give a natural narrative of what occurred, by counsel for appellee asking a new question or giving an instruction to the witness to confine himself to a direct answer to the question asked.

It will be noted that although each of these witnesses called by the appellee testified that the sugar was lowered by the winchman at the time of the injury, yet none of them actually saw it so lowered. While the fact that it did not move at all is clearly apparent upon a careful examination of the rest of their testimony, is positively stated by the witnesses for appellant, whose testimony setting forth the impossibility of the lowering of the sugar, because, had it been lowered, they would have seen the steam escaping at the time, for any motion of the "winch," whether up or down, is accompanied by escaping steam, was not denied by any of the

witnesses of the appellee, although all but the appellee himself, were recalled in rebuttal.

There is no claim on the part of any of the witnesses that there was anything wrong in the method of loading the sugar, or in the construction of any of the appliances or machinery used. The claim is that the winchman rapidly lowered the sugar without being notified to do so. It is necessary then to find out just what the record discloses as to the situation at this particular point of time.

The Witnesses For Appellee.

Five witnesses, including the appellee, testified in his behalf as to the accident. They were the occupants of the boat and constituted its crew. They were Hina and Kewiki (or David) rowers, the appellee and Bob Samoa (Toka), loaders, and Kia, the boatswain, who steered the boat and was in charge of it. (43, *161*, 96.)

The boat, a sort of whale-boat pointed at both ends, of about twenty-five feet in length, (112), was free upon the water (98, 113) some twelve or fifteen feet from the shore (131), and alongside of the landing (62), with the bow pointed towards the sea and the waves (49, 89), facing the wind (90).

Hina rowed the boat on the outside and sat away forward (49). Kewiki had the oar on the left side (68) and came next to him (51). They sat with their backs towards the sea (52), facing the space in which the load was to be put, but when the accident occurred

they "were looking out for the boat" (57) "minding their own business" (58).

Next came the two loaders, Samoa and Palapala (the appellee), who were stationed "in no particular place," but were "always here and there in the boat" (68). Palapala at the time of the accident, was right in front of the boatswain, on the right side of the boat nearest the wharf (68), with his back to the landing, looking into the bottom of the boat (69) fixing a second canvas, "which through some mistake" (129) was under a sling-load of sugar that had already been placed in the boat.

Samoa was six or eight feet from him, also engaged in pulling at the canvas and looking down (93). The boatswain stood in the stern, steering the boat, facing forward and looking at the two oarsmen (105).

Paauhau and the Method of Handling Sugar There.

The landing at Paauhau is on the windward side of the coast of Hawaii, and "faces the wind" (90). The sea-going ships drop anchor in about one hundred and thirty feet of water, and lie there while the boats go ashore for cargo. The sea rolls in toward the land with a blind swell, which is caused by a sudden rising of the bottom as land is approached. The coast is very abrupt with many rocks lying around (*155-156*).

The "landing" consists of a "kind of warehouse," and is situated some distance above the "wharf." On one side of the landing there is a shed where steam is

generated with which to work the winch (*174*). The "wharf" is a masonry construction and, when measured by a witness called by the appellee, was found to be twenty-two and a half feet above sea level, though the witness was unable to say whether that was at high or low tide (107-109).

The answer admits that the following description contained in the libel, as to the method of handling sugar is correct:—

"On said wharf there was a derrick so constructed as " to be capable of being swung out over the edge of " said wharf so that sugar hoisted thereby would be " suspended over the water; attached to the upper end " of this derrick was a block, and at its heel there was " another block, and through these two blocks a wire " fall was rove; at one end of this fall was attached a " hook used to hoist the sling-loads of sugar, while the " other end of said fall led to the steam winch which " was used to hoist the sugar to the end of the derrick, " and thence to lower it into the boat."

The boat is kept free upon the water, but is supposed to go right up close to the masonry (109). It thus lies alongside the wharf with bow to sea twelve or fifteen feet from the land (130-131). When the waves come in the effect upon the boat is that it is backed up and raised. With the receding of the waves the boat goes forward and down (131-132).

The question whether the boat shall come in to get sugar or not rests with the captain of the ship. If he thinks the weather is suitable, he orders the boat to go

after the cargo (62), and sometimes it happens that when the boat is in there to receive sugar, a big wave will come in, and the boat has to leave its position and go out where the water is deeper and there is more sea room. When the boatswain sees a big wave coming in he gives orders to the crew to row the boat out, and then, after it is quiet, they come back (99-100).

When the boat is in position to receive the sugar, the first thing that is done is to put the sacks of sugar in the sling (the sling is a rope and belongs to the ship (*157*); then the sling is hooked to the hoist and the winchman is notified by the laborer on the wharf to raise it. It is then raised until it is a foot above the level of the wharf, when it is swung out (69).

After the sling-load of sugar leaves the wharf and is carried out on the derrick, it is lowered down by the winchman half way. "As soon as the sling-load is " right above them where they can catch hold of it, " they take their hands and try to get it just where they " want it, then the boatswain gives the order to lower " it." It is then lowered a second time, and the loaders place it in the right position in the boat (50-51). In bad weather two or three sling-loads at a time are taken; in good weather four to six (*164*). The ship has three boats in which the sugar is so carried from the wharf to the steamer (43). On the day of the accident one of the boats had taken a load and gone away. The next boat received her first sling-load of sugar all right; the accident occurred while she was receiving the second (62).

Description of the Accident.

There are two points of conflict between the testimony of the witnesses for the appellee and the appellant. The witnesses for the appellee assert that the sea was calm at the time the accident occurred, and that the winchman lowered the sling-load of sugar "very fast," without being notified to do so by anyone in the boat. The witnesses for appellant testify that the sea was rough, and that a large wave forced the boat up and against the sling-load of sugar at a time when it was remaining stationary over the boat in the position in which it was required to be, pursuant to the customary method of loading, which is described alike by all and is stated above.

The first witness called by the appellee is Hina, one of the rowers. His description, if it can be called a description at all, is as follows:—

"A. It was lowered half way down, but it was not " to be lowered to the boat before we gave the signal, " but before we gave the signal it was lowered and he " was hurt then.

"Q. How did he get hurt?

"A. By the sugar."

He then continues with this remarkable statement, which is quite untrue, and cannot be accounted for in any other way than that the witness was testifying without thought, to something that he had committed to memory, possibly in the presence of other witnesses:—

"As the sugar was lowered half way down, Sam " Palapala and myself were covering the first load with

" canvas and before we had it covered and before we " notified them, the men in charge of the winch low- " ered it." (44.)

On cross-examination (Transcript, 52) he testified:—

"Q. Beside rowing the boat you had to keep watch " of the waves, did you not?

"A. Yes.

"Q. The waves came in behind your back?

"A. It is not our business to watch the waves, all we " have to do is to obey the orders of the boatswain and " when he says 'Row' to row." (52.)

And on page 57, in answer to the question, "What " did you do when you saw him struck with the sugar?" he says:—

"A. We could not do anything because we had to " look out for the boat, we had to attend to it." * * * * * *

"The waves would dash us against the landing if we " did n't look out for the boat with our oars." (57.)

And on page 58 is the following:—

"Q. When this accident happened when the sugar " came down you were tending to your own business, " were you not?

"A. Yes, I mind my own business."

It is quite evident that the witness was not assisting Palapala, as described above. It is also quite evident that his mind was not upon the loaders, their work or their dangers; otherwise would he not have warned Palapala to look out? His mind must have been riv-

eted upon the waves and their threatening danger to the boat.

There are other features of this witness's testimony upon cross-examination, which render it quite certain that the sling-load of sugar was not being lowered at the time that Palapala was hurt; but that will be discussed hereafter under the heading, "Was the sugar lowered at the time of the accident?"

The same unsupported conclusion is found in the testimony of the other rower, Kewiki:—

"Q. How did it come about, that the second sling-
" load of sugar should hurt this man?

"A. It was on account of the winchman lowering the
" sling-load of sugar without being notified to do so.

"Q. When the sling-load of sugar came down, de-
" scribe how it came down, whether fast or slow—the
" second sling-load?

"A. It was a Japanese that had charge of the sling-
" load of sugar, and first prepared to hoist it up to the
" winchman. He gave orders and they hoisted it until
" it was one foot above the dock, when he then gave the
" signal to push it off, then the winchman lowered it
" out half way." (63.)

The court will notice that he was proceeding with something like a detailed description, but this was not wanted by counsel for appellee, who interrupted the witness and repeated his question:—

"Q. What we want to know is, at the time that it

" struck Palapala, did it come down, fast or slow, how " did it come down?

"A. It came down very fast."

This constitutes the whole of the witness's description, of the accident, on the direct, up to the point where Palapala was struck.

On cross-examination, in answer to the question, "How long before the sugar struck Palapala, did you " know that it was coming down?" he testified:—

"A. I think it was about two minutes." (74.)

What did he do? Did he call out to Palapala, warning him of his danger? Did he go to his assistance? No, he "rowed on the boat." (74.)

So too with the next witness Samoa. His description will be found on page 82 of the transcript. It is a model for brevity:—

"Q. Just describe in your own way, how it was that " Palapala got injured on that occasion?

"A. We were on the boat, and the boat was shifting " out and in, out and in, when the sling-load of sugar " fell.

"Q. Just before this sling-load of sugar fell, what, " if anything was said or done, by the men in the boat?

"A. Somebody was hurt. There was nothing said."

On page 83 the description is completed:—

"Q. When the sugar fell, where did the sugar strike " him?

"A. Right on the breast." (Indicating his right breast.)

A rather singular place for a *falling* weight to strike a man. It would naturally have hit him on the head or back,—especially if he was leaning over as he says he was, leaning over to such an extent that he was unable to see it when it struck him (127).

The description is concluded in these words:—

"Q. How did that sugar come down? Fast or slow?

"A. Very fast."

We submit that not much weight is to be attached to such descriptions as these.

On cross-examination this witness lets us into the real secret of the cause of the accident. We call attention to the following:—

"Q. What were you doing?

"A. I and Palapala were the ones to receive the "sugar.

"Q. Just prior to Palapala being struck, what were "you doing?

"A. We were trying to get the canvas from under "the first sling-load of sugar and we were looking at "that.

"Q. Was your position—were you bending down "looking at the canvas in such a way that you could not "see the sugar when it came down?

"A. No, we were standing upright then, trying to "pull the canvas out from under the first sling-load of "sugar when Palapala was struck.

"Q. About how far apart were you?

"A. I was as where I am sitting and Palapala as "where the bottle of ink is (indicating thereby the

distance between the witness's chair and a point on the clerk's table, a distance of possibly six or eight feet.—Rep.)

"Q. How was it that you did n't see the sling-load "until it struck Palapala?

"A. I was busy at my work.

"Q. What do you mean by saying a few minutes ago "that you were standing up and pulling at this canvas?

"A. I was standing up, but the work is down, so I "had to look down.

"Q. Palapala and you were engaged at the same "work at that time?

"A. Yes." (93.)

We will demonstrate later that it was the duty of these persons in the boat to watch that sugar, and it was their fault that they were not doing so at the time of the accident. (See heading *infra,* "The trouble with the "canvas." (Page 73.)

The court will observe that this witness, like Hina, was "busy at his work"; in other words his mind was elsewhere employed. He was not looking at the sling-load of sugar, was not in a position to know, and did not know whether the sling-load of sugar came down or stood still. That the sling-load of sugar, if stationary, was just where it should have been, is undisputed, and is proven, in fact, alike by the witnesses for the appellee and the appellant.

Kia, the fourth witness, is also a man of few words. His description will be found at page 96:—

"Q. Were you in the boat at the time he was injured " at Paauhau, Island of Hawaii?

"A. Yes.

"Q. I wish without any questions from me you " would go on and describe that occurrence.

"A. I am the boatsteerer on the boat. The crew of " the boat had to take orders from me. We went up " there to receive sugar, to the wharf. We received " the first sling-load of sugar all right, the second sling- " load of sugar was lowered down by the winchman " without any notification from me or any of the crew " of the boat, very fast.

"Q. What happened, did it strike anybody?

"A. Sam Palapala was hurt."

On cross-examination, page 103, he testifies:—

"Q. Where in the boat was Palapala just before this " sugar struck him?

"A. He was on the side next to the landing, in the " boat on the right side, working on this canvas.

"Q. Stooping down trying to get this canvas from " under the sling?

"A. Yes.

"Q. It was while he was engaged in that work, as " you have described, that the sugar struck him?

"A. Yes."

The marvel is that he, who gave orders, did not look out for the safety of the men who were looking down at the canvas. But of this too more will be said later.

Kia then lets us into the secret of his failure to see the accident:—

"Q. What assistance did you lend Palapala, if any?

"A. I did not give any hand to help him at all, it " was Bob.

"Q. Why did n't you go to help him?

"A. I was steering the boat.

"Q. You had to look after the boat?

"A. Yes.

"Q. It was not calm enough to help this man that was " lying down, as you say, helpless?

"A. It was calm enough to give him our hand, but " the boat would be shifting here and there.

"Q. If you had not attended to the boat it would " have been dashed upon the rocks, would it not?

"A. I think it would."

And finally he admits squarely that he failed to see the accident:—

"Q. Did I understand you to say that you did not see " the sugar descend until it actually struck Palapala?

"A. No.

"Q. Is that right?

"A. Yes it is.

"Q. You were sitting in the back of the boat facing " the sling-load?

"A. I was facing forward *looking at the two oars-* " *men.*" (104-105.)

Palapala's description of the accident is no more full than those just given. He begins by saying that the steamship was fifty to one hundred yards from the wharf, names the five persons in the boat, describes the

small freight boat that they were using, and then says:—

"A. We did not make fast to the wharf because " when we got alongside the wharf there were two oars- " men supposed to keep the boat away from the wharf " all the time."

* * * * *

"A. When we got up to the wharf we received the " first sling-load of sugar.

"Q. When that sling-load was received in the boat " what was the next thing that you did?

"A. The next thing that I did was to try to get the " canvas with" (from beneath) "the first sling-load of " sugar, with the assistance of Bob, so as to get enough " canvas to prevent the sugar from being wet." (113.)

It appears later by his own evidence that this was the second canvas that had gotten under the first sling-load of sugar "through some mistake." (129.) His description of the accident itself, is in the following words:—

"Q. While you were doing that what happened?

"A. While I was fixing this I was stooping down " when I stood up with this canvas that was the time I " was struck with this sling-load of sugar." (113.)

He also relieves the winchman of all blame, unless he did in fact lower the sling-load, which we will submit hereafter was not the case. He testifies:—

"Q. Just before you got struck by that sling-load of " sugar where, if you know, was that sling-load of " sugar that struck you?

"A. It was suspended over half way.

"Q. How was it held there?

"A. It was held by the winchman." (113-114.)

Then, without any testimony from him on the point, his counsel assumes that it "descended."

"Q. When that sling-load of sugar descended de-
" scribe its rapidity, I want the rapidity of its descent.

"A. That sling-load of sugar was lowered half way
" while I was tending to the canvas. This sling-load
" of sugar was lowered so fast that I did n't have time
" to get out of the way." (114.)

That is his testimony on the direct.

On cross-examination he admits squarely that he saw the sling-load of sugar lowered half way, but did not see it moving again afterwards. We quote the following:—

"Q. Do I understand you that you did not see the
" sling-load that hurt you until it actually struck you?

"A. I seen the sling-load lowered half way—low-
" ered by the winchman half way.

"Q. After that you did n't see it again moving until
" it actually struck you?

"A. Yes, sir.

"Q. You did n't see it come down to strike you?

"A. I did n't see it because I was fixing up the can-
" vas when I was stooping down. When I stood up the
" sling-load struck me on the breast." (127.)

This is the testimony of the witnesses called by the appellee upon the turning point of their case. It con-

sists in each instance, except, possibly one, of a general statement made by a witness who afterwards admits that he did not know what he was talking about; that he did not see what he testified took place. And the one, Kewiki, who is the possible exception, makes such an improbable statement in view of all the facts, that he is not to be believed.

Had he seen the sugar suspended half way as he has described it to have been, for a period of two minutes prior to the accident, and had also seen that the two loaders were engaged in looking down at the canvas instead of preparing to receive the sugar, would he not naturally have called their attention to it? Had he seen the sugar coming down "fast" what could have restrained the natural impulse to shout, "Danger?" His silence and failure to do the natural thing is the best possible evidence that the sugar was not coming down at all, but was hanging there exactly where it ought to have been, and where it had been for the previous two minutes. The remarkable thing about it all is, that none of the persons in the boat either ordered the sugar raised or the boat pulled ahead where it would be out of danger until the trouble with the canvas was over.

Was the Sea Calm at the Time of the Accident?

In order to support the theory of the lowering of the sugar, it was necessary to show that the sea was calm at the time of the accident, and that there was not and could not have been a large blind roller, as claimed by the appellant. Consequently we find a few general

conclusions on this subject on the part of witnesses for the appellee, accompanied by the same inconsistency when details are given and the same utter impossibility of truth. The "calm" idea developed as the case proceeded.

Hina does not mention the weather on the direct. On cross-examination he testifies that it was rough:—

"Q. Have you not stated that it was also your busi-
" ness to watch the waves?

"A. Everybody is supposed to do that when it is
" rough; everybody is supposed to do that.

"Q. What was the condition of the sea at the time
" this accident occurred?

"A. It was quite rough.

"Q. Was the boat dancing around?

"A. Yes.

"Q. Is it not a fact that on this occasion, when this
" accident occurred, that the waves were dashing over
" the wharf at intervals—I don't mean every minute?

"A. Yes." (52.)

But after objection by counsel for appellee that the witness had not said "big waves," his testimony, like the weather, calms down a little:—

"Q. Were these waves big waves or small waves?

"A. Not very big, quite small.

"Q. Was it a very rough sea?

"A. It was quite rough in the morning; it was not so
" bad in the afternoon.

"Q. Was it bad at all?

"A. In the morning and part of the forenoon, but " after lunch it was all right.

"Q. Is it not a fact that the weather continued very "rough through into the next day?

"A. No; in the morning and forenoon it was quite " rough, but in the afternoon it cooled down a little." (52-53.)

This is Kewiki's testimony about the weather, on the direct:—

"Q. I will ask you to describe the condition of the " weather, on the day this thing occurred? I use " weather in the sailor's sense, meaning both wind and " sea.

"A. In the morning it was quite windy and rough.

"THE COURT. The wind was blowing in the morning " it was then rough?

"A. Quite rough. In the afternoon it had calmed " down.

"Q. Were there any waves in the afternoon?

"A. There were some waves, but all small ones." (66-67.)

It will be observed that he is not asked, and does not attempt to describe, the condition of the sea *at the time the accident occurred.*

On cross-examination the following will be found:—

"Q. About what time was it that the sea calmed " down?

"A. After twelve o'clock.

"Q. What time was the accident?

"A. After twelve o'clock.

"THE COURT. How much after?

"A. I think it was between one and two o'clock.

"Q. How much was it after twelve o'clock when the " sea calmed down?

"A. I don't know.

"Q. I want to know about the weather after twelve " o'clock; tell us, if you can, how much after twelve " o'clock it was, that the sea calmed down?

"A. I think it was half an hour after twelve o'clock." (75.)

We submit that one has only to go out to the ocean beach here after the wind has been blowing and a high sea rolling in, to find out to what an extent such a sea will calm down under ordinary circumstances in an hour or less.

The witness Samoa, on his direct, testified:—

"Q. When you came in and got alongside the wharf, " I wish you would describe the kind of waves that " were there, at that time and place, that afternoon, " alongside the wharf?

"A. I saw the *wind* at that time.

"Q. How big were the waves?

"A. Sometime the waves rose *as high as the wharf* " and farther down." (84.)

This is Kia's first evidence on the weather question:—

"Q. What was the condition of the weather on that " day as to wind and sea?

"A. It was calm so we could work.

"Q. You mean it was calm all day?

"A. It was quite calm in the afternoon. We had to " watch for our chances.

"Q. What do you mean by having to watch for your " chances?

"A. Well, we had to see when the sea was calm, that " is the time for us to go in.

"Q. During the afternoon it would be rough at times " and calm at times, and you would take advantage of " the calm moments to rush in?

"A. Yes." (101.)

Apparently realizing that his last answers were somewhat inconsistent with the "calm" idea, the witness, when asked, "What do you mean by saying that during " that afternoon you had to watch for your chances?" testified:—

"A. We watched for our chances because sometimes " there were other boats at the landing and we watched " for them. When they came out we came in.

"THE COURT. You watched for your chances with " reference to the waves or something else, let us find " out?

"A. Yes, we wait for our chances. We wait until " one boat is loaded, and when that boat came out, our " boat came in. Not in reference to the waves.

"THE COURT. So that no time that afternoon the " storm or the waves interfered with the loading of the " sugar?

"A. No." (102.)

This, although following directly upon his statement that they had to watch the sea for their chances to find

a time when it was calm enough to go in, and being utterly irreconcilable with it, is, we submit, no more irreconcilable than is his prior statement that the winchman lowered the sling-load of sugar "very fast," followed by the admission that he did not see it at all at the time of the accident. The two taken together show how little credibility can be given to his testimony. But the quoted testimony is not all that the witness gives to assist us in arriving at the truth about this weather question. Following the last question and answers quoted is this evidence:—

"Q. How had the waves been in the morning, rough
" or calm, big waves or small waves?

"A. In the morning, high seas, high waves.

"Q. Would you say it was very rough?

"A. It was very rough.

"Q. About what time did it calm down?

"A. I think it was after twelve o'clock." (102.)

We submit again that a very rough sea with high waves, does not calm down in an hour or less. Moreover, on his direct, page 98 of the record, he testified in answer to the question "What is the purpose of that
" canvas, what purpose is it intended to serve?"

"A. So the sugar won't get wet."

On cross-examination, page 99, he testifies as follows:—

"Q. What danger was there of the sugar getting wet
" by your transferring it from the wharf to the steamer?

"A. The company would lose by it.

"THE COURT. What was the danger?

"A. The danger of being wet by the sea water.

"Q. You mean the waves going over the boat?

"A. Yes.

"Q. About what time was it this accident occurred?

"A. In the afternoon.

"THE COURT. What time in the afternoon?

"A. I think between one and two o'clock.

"Q. Was this the first trip you made after dinner?

"A. Yes.

"Q. What time do you take dinner?

"A. Half-past eleven o'clock.

"Q. If you take dinner at half-past eleven o'clock, " and you state this occurred the first trip after lunch, " how do you place the time as between one and two " o'clock?

"A. Well, we have to wait until it is calm enough for " the boats to go up to the wharf.

"Q. You mean you leave the steamer, then you have " to wait for some time before you get a favorable op- " portunity to go to the wharf?

"A. Yes."

Evidently if the sea had been as calm as he was trying to make out under the "calm" idea, all this caution in regard to favorable opportunities and protection from sea water would have been quite unnecessary. But there is still other testimony in the record that further emphasizes the idea that the sea was rough, and at the very time that the accident occurred.

It will be remembered that the boat was free upon

the water; was kept in place by the use of oars; that the oarsmen received their orders from this same Kia, who stands in the stern steering the boat, and who also gives orders to the winchman when he shall lower the sugar; (44) who is in fact in general charge of the boat and the loading and exercises a liberal amount of discretion in all matters pertaining thereto.

The testimony referred to is found on pages 103 to 105 of the record, and shows that something about the action of the waves riveted his attention quite closely, not upon the sling-load of sugar nor upon the winchman, nor yet upon the loaders who were working at the canvas. His whole attention was fixed upon the *oarsmen*:

"Q. What assistance did you lend Palapala, if any?

"A. I did not give any hand to help him at all, it " was Bob.

"Q. Why did n't you go to help him?

"A. I was steering the boat.

"Q. You had to look after the boat?

"A. Yes."

* * *

"Q. If you had not attended to the boat, it would " have been dashed upon the rocks, would it not?

"A. I think it would".

* * *

"Q. You were sitting in the back of the boat facing " the sling-load?

"A. I was facing forward looking at the two oars- " men." (104.105.)

Palapala himself, has little to say about the condition of the sea at the time the accident occurred. On cross-examination he testifies as follows:—

"Q. How was the boat behaving at that time?

"A. (Through the Interpreter.) It was not very " steady. It was going forward and backward.

"Q. What was making it go forward and backward?

"A. (Through the Interpreter.) The waves. When " the waves come in it makes the boat go in and come " back again." (129.)

* * *

"Q. What is the effect of the waves upon the boat? " What was the effect of the sea coming in?

"A. It is backed up.

"Q. Any other effect upon the boat?

"A. When the waves come in it draws the boat in " and the oarsmen row the boat out again." (131.)

* * *

Is it not apparent that the sea was anything but calm? Does not all the intrinsic and most of the direct evidence establish that it was rough and treacherous?

What Do the Witnesses for Appellant Say upon These Two Points?

The witnesses for the appellant testify:—

a. That the sling-load of sugar was not lowered at the time of the accident.

b. That the sea was rough and that a large blind roller came in, raising the boat, and throwing it against

the sling-load of sugar which was suspended over the boat, in the very position in which it was required to be kept under the custom of loading as described by the witnesses for the appellee.

A. The Sling-Load was not Lowered.

Five witnesses also testify for the appellant as to the manner in which the accident occurred. Captain Nicholson, master of the steamer "Helene" (*153-172*); Richard Westoby, in charge of the landing (*177-182*); Naka, an employee who bound the sling about the bags of sugar (*183-192*); S. Fuijimoto, also employed on the landing (*192-194*), and Manuel Enos, the winchman (*194-204*).

The captain of the steamer testifies:—

"Q. Did you see the accident to Palapala?

"A. Yes, I was looking positively at the time." (*157.*)

* * *

"THE COURT. * * * What we want to know is " what happened that morning?

"A. I would like to tell it just as I saw it.

"THE COURT. That is all right.

"A. I was sitting by the rail of the steamer, and " when I would see my vessel roll very heavily in an " exceptionally large swell, I would whistle to them, " and when they heard me whistle, they would start to " pull out from underneath the crane as quick as they " could. The whistle was a warning that a big swell " was coming in.

"THE COURT. Could you whistle loud enough to be "heard?

"A. I think I could whistle loud enough to be "heard down at the post-office. (Distance of five "blocks.)

"Q. What would they do when they heard you "whistle?

"A. They would always then pull out from danger.

"Q. What danger?

"A. The danger of the boat being under the crane "or dashed to pieces. Then when they saw this sea "was past to the best of their judgment, they would "back the boat underneath the crane again close enough "so that they could receive the slings of sugar. This "time, I think the boat had been in and out, in and out "three times. This was the second or third time they "had been under the hook. That is I whistled for "them to come out and they came out. That time they "got underneath the hook was the third time they "had been under the crane. A big swell had come and "I whistled and that told them to go back out until "the swell had passed. They got back this third time "when this accident happened. That is, they had cir-"cumnavigated three times." (*159-160.*)

The captain's testimony, to the effect that the boat had been in and out three times in obtaining that load of sugar, is not denied by any of the witnesses of the appellee, although all but the appellee himself were recalled in rebuttal; nor is it denied that that was the third time that they had gone under the crane for the purpose of receiving the second sling-load of sugar.

Now with the sea rough and the danger threatening, were not the loaders, Samoa and the appellee, taking unwarranted chances, if they were stooping over fixing the canvas, as they have described? Ought they not to have been looking up, or, at least, ought they not to have fixed their canvas while the boat was out waiting for the sea to calm down sufficiently for them to go in and get the load?

Westoby, the man in charge of the landing, gives the following description of the accident:—

Having identified the day of the month upon which it occurred, he is asked, "Where were you?"; the testimony then proceeds:—

"A. Near the landing looking down towards the " foot of the landing.

"Q. Did you see the accident?

"A. I did.

"Q. Was there anything to obscure your view?

"A. No.

"Q. What time did it take place?

"A. In the afternoon, a short time after lunch.

"Q. Can you give us a little closer idea, as to time?

"A. Between one and two o'clock.

"Q. What were the conditions of the weather that " day, as to wind and sea?

"A. Very rough.

"THE COURT. That is, the sea was rough?

"A. The sea was rough, yes sir.

"Q. How was it at the time the accident took place?

"A. It was very much the same all day.

"Q. Will you describe to us in your own language "how this accident took place?

"A. I was standing at the window of the landing." (*173.*) * * * "To one side there is a shed where "the steam is generated to work the winch. The sugar "is stored in the house. In fact the landing is a kind "of warehouse." (*174.*)

* * *

"Q. Is this on the mainland or on the wharf?

"A. The mainland.

"Q. How far is that from" (above) "the wharf?

"A. About 150—145 to 150 feet.

"THE COURT. Well, go ahead.

"A. I saw the sling-load of sugar was in the fall at "the foot of the landing, hanging on the crane. The "boat was underneath the sling of sugar that was hang- "ing there. There were two men ready to receive the "sugar as it would come down. The sugar was stand- "ing perfectly still. The rollers coming in raised the "boat, and sometimes drifted it shorewards. At the "same time, these men were standing reaching for the "sugar, in this position (indicating a position of the "arms outstretched above the head). A roller struck "the boat, it also raised her and jammed him. The "winchman then started to take the sugar up. The "boat receded down, and the boys pulled away from "the landing.

"Q. You say you were at that time 145 to 150 feet "away, what do you mean?

"A. One hundred and forty-five to one hundred and "fifty feet above the boat on the landing.

"Q. You were looking down?

"A. I was looking an inclined plane.

"Q. How far were you away in a direct line?

"A. I am not sufficiently good in mathematics to tell " you how far I was in a direct line.

"THE COURT. Tell us about how far.

"A. Nearly 50 feet in a straight line." (*174-175.*)

* * *

"THE COURT. You were about fifty feet in a straight " line from where?

"A. From the boat, in a straight line.

"THE COURT. Go on, Judge.

"Q. When this boat was lifted up, as you say, and a " man in it was struck in the chest by this sugar, how " did he fall?

"A. When the boat came up he was jammed between " the gunwale of the boat and the sugar. The sugar " held him there until the boat receded, then he stag- " gered and fell in the bottom of the boat.

"Q. There is testimony to the effect that the winch- " man suddenly let the sling-load fall on the man with- " out any signal from them, what do you say about that? * * * And at such a rate of speed that it could not " be stopped?

"A. No." (*176.*)

* * *

"Q. What became of the sugar?

"A. It was hoisted up halfways so as to clear the " landing.

"THE COURT. Halfway up the arm of the—

"A. Boom.

"Q. How high is that?

"A. It hoists it about 20 feet above the boat.

"Q. What was then done?

"A. It was allowed to hang over in the sling at that " time.

"Q. Was it taken into the landing?

"A. Not then.

"Q. Was it taken into the landing at all?

"A. Yes.

"Q. What was the condition of the sugar?

"A. It was wet.

"Q. Wet by what?

"A. By the sea.

"THE COURT. The sugar was wet by the sea?

"A. Yes.

"THE COURT. You went down, did you?

"A. Yes, sir.

"THE COURT. And you saw it?

"A. I saw the sugar was wet.

"Q. Was that sugar shipped on that trip of the " 'Helene'?

"A. No, it was sent back to the mill." (*176-177.*)

The stars indicate immaterial portions of the record, objections of counsel, or temporary digressions from the main narrative.

The court will observe that the testimony is clear and precise, and that the witness, like the captain of the ship, denies that the sling-load of sugar was lowering at the time of the accident.

The next witness, Naka, an employee on the plantation, whose work at the wharf was that of lifting bags of sugar to a high place after they had been lowered from above; in other words, piling the sugar up, says that on the occasion of the accident he was working on the landing, and continues:—

"A. The man over there" (indicating some one, either the manager or the appellee) "was getting ready to " receive the bags of sugar from the upper landing " when a swell of the waves came and moved the boat, " causing him to strike the bags of sugar.

"Q. Where was this sling-load of sugar just before " this man was struck?

"A. It was just hanging there ready to be placed in " the bottom of the boat.

"Q. You mean it was hanging over the boat?

"A. Yes.

"Q. How high above the boat?

"A. About three or four feet.

"Q. Whereabouts in the boat was Palapala, before " he was struck by the sugar?

"A. He was standing right in the middle of the boat, " the center of the boat.

"Q. Was there no one else standing up in the boat?

"A. There were 5 people in the boat at that time, " 3 of whom were attending to the oars and the steering, " and 2 receiving the bags of sugar.

"Q. How was it just before the accident?

"A. The sugar was hanging over the boat. (*185.*)

* * *

"Q. Was anything done with the sugar, after you "saw it hanging 3 or 4 feet above the boat?

"A. Palapala was just getting ready to receive the "sugar, which was hanging over the boat, when a swell "of waves came and struck Palapala with the sugar.

"Q. Did the sugar itself move from the time you "saw it 3 or 4 feet above the boat, until after the man "was hurt?

"A. Palapala was just receiving the bags of sugar, "so as to put them in position in the boat, when a swell "of waves brought him in contact with the sugar." (*185-186.*)

And on cross-examination the following will be found:—

"Q. When you say the libelant here was in the act of "receiving the sugar, what do you mean by that?

"A. Palapala was then reaching up his hands for the "bags of sugar which were hanging over the boat, when "he came in contact with these bags of sugar." (*188.*)

* * *

"Q. Was not that sugar as far over the boat as is the "ceiling of the courtroom from the floor?

"A. Yes, about that.

"Mr. STANLEY. Does he mean that this sling-load "was that distance over the boat?

"A. What I mean by that is, that that is the height "between the landing and the boat.

"Q. Judge" (referring to Mr. Stanley), "ask him "if this sling of sugar was not as far from the boat as "the height of this room." (To the interpreter.) "Does "he mean that?

"A. What I mean to say is, that the *sugar* which was " then placed *on the landing,* down to the boat, is as " far from the floor to the ceiling, but the *sling-load* at " that particular time was 3 or 4 feet away from the " boat." (*188-189.*)

* * *

"Mr. STANLEY. With reference to that particular " part of the boat, do you mean the edge of the boat?

"A. He was standing in the boat and the depth of " the boat in which Palapala was standing reached up " to his waist.

"Q. If it is true that Palapala was standing there " with half of his body in the boat, and if it is also true " that the sugar was 3 or 4 feet above the gunwale, and " a big wave came along, how is it possible that that " man's shoulder got hurt? Would it not shoot past " the boat?

"A. While Palapala was standing in the boat a great " big wave came in and lifted the boat up so that he " was swung against the sling of sugar.

"THE COURT. The sugar did n't strike him, he struck " the sugar?

"A. It was caused by the moving of the waves.

"THE COURT. Did he strike the sling-load of sugar, " or did the sling-load of sugar strike him?

"A. The boat moved against the sling-load of sugar.

"THE COURT. Then he struck the sling of sugar, the " sugar did n't strike him?

"A. At that particular point I did n't see myself. I " saw the boat move, when Palapala was in the boat, " against the sling of sugar." (*189-190.*)

S. Fujimoto, a Japanese employed on the landing,

saw Palapala get hurt, and thus described the accident:—

"A. That day, the sea it was very rough that day. " One other Japanese by the name of Tanaka was put- " ting 10 bags of sugar in a sling; I was there at the " time. Tanaka was lowering the sling of sugar down " into the boat. It was up 4 or 5 feet above the boat, " when I saw a big swell of wave come and strike the " boat. The libelant Palapala was at that time pre- " paring to receive the bags of sugar which were hang- " ing over the boat, when the swell of waves came and " moved the boat backwards and struck his shoulder " against the sling of sugar. Just as soon as he struck " himself against the sling of sugar, he was assisted by " those in the boat, and was carried ashore.

"Q. Carried ashore?

"A. Carried ashore on the steamer." (*193.*)

On cross-examination he testifies that he did not notice whether or not Palapala stood with his arms raised.

"Q. What was the position of Palapala at the time that, as you say, he was preparing to receive the sugar?

"A. They were standing in the center of the boat " when this swell of wave came up.

"Q. Where were his arms, in what position?

"A. I could not see.

"Q. Did you have as good a view of this occurrence " as Naka?

"A. I did.

"Q. You say you could not see where his arms were. " Did you see his arms extended up above his head?

"A. I could not see." (*194.*)

With regard to the noticeable conflict in the testimony of the witnesses for the appellant and the appellee, as to whether or not Palapala was raising his hands at the time of the accident, as described by the witnesses for the appellant, or whether he was looking down at the canvas and did not see the sugar at all, as described by his own witnesses, we are inclined to believe that the witnesses for the appellee were confused, and that the truth of the matter is given by the witnesses for the appellant.

They would not be so quickly subjected to instantaneous excitement as would those in the boat. The unexpected action of the water, which required such intent attention to be given by the rowers and the steersman to the mere handling of the boat, would not, naturally, have operated so impressively upon the minds of those farther removed from the immediate scene of action.

So, while the testimony of the witnesses for the appellee, that the two loaders were looking down when they should have been looking up, is decidedly to our advantage, inasmuch as it shows that they were unwarrantably inattentive to their danger, we are inclined, nevertheless, to agree with the witnesses for appellant who attribute the injury to inevitable accident.

Our belief that the witnesses for the appellant were telling the truth is strongly enforced by the fact that none of the witnesses for the appellee, save possibly Kewiki, whose testimony is wholly improbable, actually saw the sugar at the time the accident occurred.

Then, too, while the oarsmen and the boatswain were intent upon the action of the water, there was time enough for Palapala to have straightened up and lifted his arms, as he is said to have done. He would naturally have had no recollection of what he did in the final moment before coming in contact with the sugar. He was rendered insensible as soon as the accident occurred.

The point of it all is, that the whole thing happened so quickly and so unexpectedly, that no one appreciated just how the accident happened. And while, if the testimony of the appellee's witnesses is true, and he is bound by it, there is shown to have been contributory negligence on his part. On the other hand, if it is not true the record shows a case of inevitable accident. Whatever the truth may be, we confidently assert that nothing can be found in this record to support a finding that the appellant, or any of its servants, was guilty of negligence at the time the accident took place.

The last witness for the appellant, who testified as to the accident, was the winchman, Manuel Enos. He had been employed upon the plantation for ten years, and there is nothing in the record that shows, even by inference, that he was either incompetent or inattentive at the time. On the contrary everything indicates that he was capable and keenly alert to all that was, or could have been, required of him. All the witnesses, with one possible exception (Kewiki), agree in stating that he raised the sugar instantly when the accident occurred.

The only claim made by the witnesses for appellee, was that he lowered the sugar at a time when he was not requested to do so; but that claim is, without doubt, a mere theory on their part. It is not something which they saw or testify to as a fact known to them.

Enos first describes the method of loading the sugar as follows:—

"Q. What do you do as winchman?

"A. Lower sugar into the boat.

"Q. What is the first thing done with the sugar; " when at the landing what is the first thing done?

"A. It is piled up on the landing, then it is put in a " sling, and then it is pulled over the landing, then it " is lowered down until it is as high as the boat.

"Q. The first thing that is done is to hoist it up?

"A. Yes.

"Q. What is next?

"A. Push the sugar over the landing.

"Q. Off the landing?

"A. Yes, I then lower it down.

"THE COURT. You lower it into the boat?

"A. No sir.

"Q. Where do you lower it?

"A. To this high over the boat. (Indicating about $2\frac{1}{2}$ feet.)

"Q. Afterward you lowered it into the boat?

"A. I lower it to that height and when I get the " signal I lower it further down.

"Q. What guide have you as to when you should " raise or lower the sugar?

"A. After it gets to this height I do not lower it un-
" til I get the signal.

"Q. Where do you get the signal?

"A. From the boatman.

"Q. What boatman?

"A. Whoever happens to be in the boat.

"Q. Do you remember when this man was hurt?

"A. Yes.

"Q. Where were you at that time?

"A. I was in the donkey.

"THE COURT. You were there when this man was
" hurt?

"A. Yes.

"Q. Now how was he hurt?

"A. I had the sling about this high (indicating
" about two feet); a wave came and the sugar struck
" him against the boat.

"Q. What part of the body did it strike him on?

"A. Right here (indicating the chest).

"Q. At the time that the sugar struck him what were
" you doing? Just before it struck him were you doing
" anything with the winch?

"A. No I had the sling stopped.

"Q. After you stopped it there, did you do anything
" again with the sling until after the man was hurt?

"A. No, sir.

"Q. What became of the man when he had been
" struck with the sugar?

"A. I pulled the sling up. Then the boy he fell down
" in the boat." (*196-198.*)

It will be observed that this witness also denies posi-

tively that the sling-load was lowered. He was certainly in a position to see, and did see, for he instantly raised the sling-load upon the appellee coming in contact with it.

Before summarizing the above evidence and discussing the weight of it, we will briefly call attention to the testimony of the witnesses of the appellant upon the condition of the sea at the time of the accident. They testify that,

B. A Blind Roller on a Comparatively Rough Sea Caused the Accident, without Fault on the Part of Either the Winchman or the Appellee.

This is Captain Nicholson's description of the weather:—

"Q. Will you state the condition of the weather on " the day that Palapala got hurt?

"A. It was bad weather.

"Q. Both as to wind and sea?

"A. It was the worst kind of a sea off the Hamakua " coast. The wind was north, directly across the track " of the rollers, right between of each one, making a " blind swell.

"Q. What is that?

"A. The sea rolls in a way that you cannot judge the " distance at all. One hundred feet from the landing " at Paauhau you get 19 to 20 fathoms, then it drops to " 40 to 45 fathoms. The sea rolls with a blind swell; " it rolls in such a way because the depth jumps from " 230 feet to 20 fathoms."

* * * *

"THE COURT. When the sea is from the north, it is " difficult to handle a boat?

"A. Yes. In fact, we stop work with half a wind. " We have to go to work from another direction.

"Q. You spoke of blind rollers coming in. Where " do they break?

"A. They may dash up against the landing. Some- " times it will take a boat and shove it right over." (*154-158.*)

The captain's testimony in regard to the condition of the sea is quite full and detailed. We have only attempted to give the gist of it, as we wish to condense the testimony as much as possible. A reference to the pages given, however, will give it all.

Westoby says of the weather:—

"Q. What were the conditions of the weather that " day, as to wind and sea?

"A. Very rough.

"THE COURT. That is the sea was rough?

"A. The sea was rough, yes sir.

"Q. How was it at the time the accident took place?

"A. It was very much the same all day." (*173.*)

Naka testifies:—

"Q. Did many of those waves come up to the land- " ing?

"A. Yes.

"Q. The fact of the matter is, that it was an un- " usually rough day, and the waves were very high, " and so high that many of them swept up on the land- " ing, is not that so?

"A. Yes.

"Q. There was some sugar on the landing that got "wet, did n't it?

"A. Some were wet.

"Q. They are very big waves when they sweep up "on the landing?

"A. These bags of sugar were wet by the coming up "of these large waves on the landing." (*187-188.*)

Enos says it was "awful rough":—

"Q. What was the condition of the weather that "day?

"A. Awful rough.

"Q. What effect did that have on the boat?

"A. A big wave came.

"Q. Ordinarily, what effect would it have on the "boat? (Interpreter here translates).

"A. Keep the boat in motion all the time." (*198.*)

And on cross-examination he repeats that it was "awful rough":—

"Q. You say the sea was awful rough?

"A. Yes.

"Q. How did you know it, did you see it?

"A. Yes." (*200.*)

We submit that the "calm" idea is not very well supported by the record. The little that can be found is only proof of the recklessness with which the witnesses for the appellee testified in support of a theory, and shows how little can be attached to their general conclusions. They knew that the sea was not calm, and their testimony as a whole clearly shows that the idea

was so far at variance with the truth, that they were unable to stick to it with anything like consistency.

The Law of Negligence and What Is Required to Prove the Same.

Before proceeding further, it may not be out of place to direct the court's attention to a few authorities, and to briefly summarize the testimony of the witnesses of the appellee and the appellant upon these two points of difference.

A leading Supreme Court case on the question of the liability of a defendant, where negligence is charged, is the Nitro-glycerine case, 15 Wallace, 524. After reciting the facts, and some law peculiar to carriers, the court quotes with approval, the following definition of negligence laid down by the court of Exchequer Chamber:—

"Negligence is the omission to do something which "a reasonable man guided by those considerations "which ordinarily regulate the conduct of human "affairs, would do, or doing something which a pru- "dent and reasonable man would not do." The court then continues: "It must be determined in all cases by "reference to the situation and knowledge of the "parties and all the attendant circumstances. What "would be extreme care under one condition of "knowledge and one state of circumstances, would be "gross negligence with different knowledge and in "changed circumstances. The law is reasonable in its "judgment in this respect. It does not charge cul- "pable negligence upon any one who takes the usual

The rules deducible from these cases are as follows:—

1. Where the duty is defined, the question arises whether that duty was performed. This is the test of negligence. If the duty was performed, one can not be held; if there was a failure to perform the duty there is liability.

2. In cases of accident, like the one before this court, where the injured party is rightfully at the place, and doing the work at the time of his injury, and the circumstances of the accident are such that it may have been unavoidable, the plaintiff, charging negligence, assumes the burden of proving it,—he must show that the defendant, by some act or omission, has violated a duty incumbent on it from which the injury follows as a natural consequence.

3. This does not mean the mere making out of a *prima facie* case, but the establishment of some specific failure or omission on the part of the defendant, sustained by a preponderance of the evidence.

With this statement of the law before us, and we cannot believe that the correctness of it will be questioned, what does the record show? It shows:—

First: That the method of handling sugar is defined, and so is the duty of the winchman; likewise the duty of the men in the boat;

Second: That there is a claim, a very weak and badly asserted one, that the winchman was negligent

in performing his duty, in that he carelessly lowered the sugar at the time of the accident;

Third: That this assertion is emphatically denied by the witnesses for the appellant; and

Fourth: That all the inherent probabilities of the case, strongly establish that the witnesses for the appellee were mistaken, that the winchman did not lower the sugar as charged, and that the accident occurred either through inevitable accident, or the failure of the appellee and his fellow-servants to take those precautions for their safety which the situation required.

Who Was Responsible for Taking Cargo That Day?

This has already been briefly referred to. The court will remember that the question of whether the sugar should be received lay wholly with the ship. On the day of the accident the ship was lying off the Paauhau landing, went away to another landing (Wookla), saw that it was too rough to take freight there, and so came back again to Paauhau. (*155-156.*) Moreover, the witnesses on both sides have testified that when they returned they lay there for some time (until after lunch), waiting for it to calm down sufficiently to warrant them, in their judgment, going after cargo. (75.)

So, too, the men in the small boat decide the question when they shall receive the sling-loads of sugar. (71-99.) And it will be remembered that on the day of the accident they had made three attempts to receive the particular sling-load of sugar that caused the injury. (*159.*)

The winchman on the other hand had nothing to say about these questions. His testimony is that he had no right to say whether it was rough or not as to his work; that he was required to work in any weather. (*203.*) In other words when the boatmen approached all that he had to do was to lower the sugar without arguing whether or not it was too rough out there for them to receive it. This is not denied by any of the witnesses for the appellee, although they were recalled to the stand after this testimony was given.

There is no conflict then as to who decided the question as to whether the sugar should be received; and if the accident arose from indiscretion in that respect, the fault lies with the boat and not with the plantation. And for any fault occurring on the boat, whether it was the specific fault of the appellee or of the captain, or the boatswain, appellant is not chargeable.

"When one enters into the employment of another " he assumes all the ordinary risks attendant upon it; " and where a number of persons enter a common em- " ployment for another, all being upon a common foot- " ing, and one receives an injury by the neglect of " another, they are the agents of each other, and no " recovery can be had against the employer."

Louisville etc. R. v. *Moore,* 83 Ky. 683-84.

And again:—

"It is implied in the contract that the servant risks " the dangers which ordinarily attend the business— " among which is the carelessness of those in the same " employment, with whose habits, conduct and capacity

" he has had an opportunity to become acquainted, and " against whose neglect he may guard himself."

Hough v. *Texas & Pac. R. Co.,* 100 U. S. 213-26.

Of course we do not assert that the law of master and servant, as such, enters in to relieve the appellant from the consequences of any negligence that the winchman may have been guilty of. What we do assert is that the winchman was not guilty of any negligence, and that, if there was any error of judgment or negligence on the part of any of the appellee's fellow-servants in the boat, it was his misfortune, and he cannot charge the appellant with responsibility for acts that arose from such a cause. If the accident arose either because the captain made a mistake in ordering him to go in after sugar on such a rough day and the boatswain kept the boat in there at a time when it was too rough to properly receive the sugar; or if, on the other hand, the boatswain made a mistake in not ordering them to go out until they fixed their canvas; or if they made a mistake themselves in looking down at the canvas when they should have been looking up at the sugar,— if any of these conditions or circumstances were the true cause of the accident, then, we assert, the plaintiff cannot recover from the appellant.

It must be presumed that the plantation company paid the ship sufficient freight to cover all contingencies, and that the men who accepted employment with the ship knew the dangers and were willing to risk them. Undoubtedly there were other carriers de-

sirous of competing for the business and the appellant could hardly be expected to dredge out a harbor in such an unlikely place as that was.

The Method of Loading the Sugar.

The method of loading the sugar has already been described, and there is no conflict as to that. It is described alike, or conceded by all the witnesses, and none find any fault as to that. It is, apparently, the best method that could be adopted on that rough and rocky coast.

Briefly it consists in placing the sacks of sugar in the sling and swinging them out over the water; lowering them near to the boat; holding them there until the boat is immediately beneath, and then, upon signal received from the boat, lowering them altogether.

Now if the record shows that this method was employed strictly, without any departure up to the point when the accident occurred, then surely the appellant is not chargeable with negligence. For then there will be no breach of duty, and without proof of a breach of duty there can be no liability on the part of the appellant for the injuries the appellee received.

What does the record show? Hina says in answer to the question, "Where was the boat at the time that he" (the libellee) "got hurt?

"A. Under the place where the sling-load of sugar " was to be lowered." (43.)

Showing that the sling-load was in the proper place, namely, over the boat.

Samoa testifies that:

"A. It" (the sling-load of sugar) "was hanging over " the boat there.

"THE COURT. How far up?

"A. About 15 or 20 feet above the sea.

"Q. Do you know what the height of that wharf was " above the water?

"A. I don't know.

"Q. Can you state how high?

"A. About fifteen or twenty feet." (94.)

In other words it was hanging out over the water, about even with the top of the wharf at the time that the witness last saw it, which was, undoubtedly, at a time when the boat was down with the falling of a wave. At the time of the accident it rose on the wave to within three or four feet of the edge of the boat.

We quote:—

"THE COURT. He says the sling-load of sugar was " down within 3 or 4 feet of the boat, *when the waves* " *came in.*" (*188.*)

The continuance of Samoa's testimony is very significant, for it demonstrates between the lines, absolutely, that the winchman was holding the sling-load exactly where it was required to be at the time the accident occurred.

"Q. While this load was so suspended was not the " boat shifting too?

"A. *It was not, it was quite still, it was steady.*

"Q. If the boat was steady, why was not the signal " given to let the sugar come down?

"A. We could not give any orders because the can-
" vas was under the first sling-load of sugar. We had
" to get that out before we could receive another one.

"Q. Was that the only reason the order was not given
" to let the sugar come down?

"A. *Yes, the only reason.*"

So, too, the appellee testifies unqualifiedly to the same effect:—

"Q. Just before you got struck by that sling-load of
" sugar where, if you know, was that sling-load of sugar
" that struck you?

"A. It was suspended over half way.

"Q. How was it held there?

"A. *It was held by the winchman.*" (113-114.)

We have already shown that it was the duty of the winchman to so lower the sugar, and to so hold it there until the loaders were ready to receive it. Now Palapala also shows what was the duty of the boat crew in this behalf:—

"Q. There is considerable action there, is there not?
" Considerable action in the boat while the waves come
" in and strike the boat and then recede?

"A. It cannot because we have two oarsmen to keep
" the boat steady. When the waves come we have the
" boys pull ahead.

"Q. There would be considerable action in the boat
" if it were not for these oarsmen, would there not?

"A. Yes.

"Q. When you see this action of the waves you roll"
(row) "the boat out of the way?

"A. Yes, we always try to pull out." (130.)

That is, it was the duty of the winchman to keep the sugar in place, stationary. It was the duty of the oarsmen, unless otherwise ordered, to get the boat squarely under the sugar until the loaders were ready to receive it. It was also their practice, at times of unusual likelihood of danger, "to pull out"; that is, they row out to a place of safety when the big waves come in. It was their custom to look out for their own safety. They did not depend upon the winchman—he was required to do his duty, they used their judgment.

The boatswain who was in charge of the boat, "from "whom the crew of the boat had to take orders" (96), whose business it was to notify the winchman to lower the sling-load (44), who watches the waves and says, "row" to the rowers (52), was the only man, by the undisputed evidence, vested with discretion and judgment. All of the others have prescribed duties to perform, and, clearly by the weight of the evidence and all the inherent probabilities, there was no failure on the part of any of those on shore to do their exact duty. The failure, the carelessness, the oversight, the negligence, whatever it was, came from the persons in the boat. They took a chance when they kept that boat in its place under the sling-load of sugar, and, with heads bowed down, worked upon that canvas which, "through "some mistake," had become caught where it ought not to have been. Hence, under the well-established rule that he who is most at fault must bear the consequences, the appellee cannot rightfully assert a claim against the appellant.

Was the Sugar Lowered?

Admitting that the crew were in proper position and that the winchman was not otherwise at fault, the crew of the boat joined in an assertion that the sugar was lowered "altogether" without an order from the boat to do so. The claim is a mere opinion, a conclusion, an inference, is not supported by detailed testimony, is badly shaken by all the inherent probabilities, and is emphatically denied by the five witnesses for the appellant.

Hina's testimony, it will be remembered, was to the effect that it was lowered half way down, "but before " we gave the signal it was lowered and he was hurt." But two things show clearly that he did not see the sugar: First, that he was attending to his own business, minding his oars (58), and, second, he did not call the attention of the loaders to their danger. (59.) Had his mind not been upon his own duties, but upon theirs, he would have seen that Palapala was about to be hurt and would have warned him. He was testifying to theory rather than fact.

There is like testimony from Kewiki, accompanied by the same inherent improbabilities. He puts it thus:—

"The second sling-load of sugar is the sling which " Palapala met with the accident.

"Q. How did it come about that the second sling- " load of sugar should hurt this man?

"A. It was on account of the winchman lowering " the sling-load of sugar without being notified to do " so." (63.)

It will be noticed that he does not say he saw the sugar come down, or testify to any fact, but to a mere opinion, which, under all the rules of evidence, especially in Federal courts, is entitled to very little consideration.

Ardmore Coal Co. v. *Bevil,* 61 Fed. 757.

A person who saw an event like that occur could certainly tell more about it. On the other hand, if he was not telling the truth and should be charged with perjury, he could escape by asserting that he was not testifying to a fact, but to a mere opinion, as to which he was mistaken. So, too, his testimony that he saw this sling-load of sugar suspended and hanging there "about two "minutes" prior to the accident, should be taken as meaning that he *had seen it* about two minutes prior to the accident, instead of for two minutes preceding the accident. (74.)

Samoa and Palapala, the two loaders, do not claim to have seen the sugar descend. They both testify, as we have already pointed out, that they were looking down at the canvas and did not see the sugar at the time the accident occurred. Samoa admits that he did not see the sling-load until it struck Palapala. He was standing up, but the work was down. He and Palapala were engaged at the same work at that time. (93.)

Palapala also says that he saw it lowered half way (the required and proper position), and that he did not see it moving again until it actually struck him. (127.)

The other witness, Kia, also disclaims having seen the sugar immediately preceding the accident:—

"Q. Did I understand you to say that you did not see " the sugar descend until it actually struck Palapala?

"A. No.

"Q. Is that right?

"A. Yes, it is." (105.)

The reason given by him, will be remembered, he was "looking at the oarsmen."

Now, on the other hand, the witnesses for the appellant assert positively that they did see the sugar.

Captain Nicholson says: "I was looking positively " at the time." (*157.*)

He swears that he saw the accident: "I saw the " plaintiff as he was in the boat; I saw the whole acci- " dent." (*163.*)

He says that the sugar was not lowered, and could not have been going down at the time, because if it had been he would have seen the steam escaping, which always accompanies any movement of the sugar, whether up or down. (*164-165.*)

Westoby also saw the accident, says that the winchman was doing his exact duty, and that he did not lower the sugar. (*175-176.*) He says:—

"Q. So that they" (the loaders) "were underneath " the sling-load of sugar?

"A. No, not beneath it exactly.

"Q. If they were away from it, how do you explain " their standing with their hands up, reaching for it?

"A. So that when the sugar started to come down, "they could push it forward or sideways, so as to "trim it.

"Q. They were so close to the sugar, that when the "sugar came down they could direct it to the proper "place in the boat?

"A. If the sugar came down he was near enough so "he could reach for it, and get hold of it.

"THE COURT. Did it come down so fast that it could "not be directed.

"A. It didn't come down.

"Q. It didn't come down?

"A. The sugar did not come down." (*181.*)

Naka denies that the sugar was lowered, and says:—

"Palapala was just getting ready to receive the sugar, "which was hanging over the boat, when a swell of "waves came and struck Palapala with the sugar." (*186.*)

Fuijimoto testifies to the same effect. (*193.*)

Enos says emphatically that he had the sling stopped. (*197.*)

This, briefly stated, is the whole of the testimony on this point, and we submit that it cannot be made the basis of a judgment against the appellant. This is a trial *de novo,* and the court examines the testimony and weighs it unqualifiedly.

The Sirius, 54 Fed. 188, C. C. A. 9th Circuit;

The Cloquitlam, 77 Fed. 744, 9th Circuit. C. C. A.

The burden of proof is on the appellee.

"A party charging negligence as a ground of actio
" must prove it."

Nitro-glycerine Case, and other citations above.

The most that can be said to the disparagement of the appellant is that the true cause of the injury does not clearly appear. It might possibly be argued that it does not *clearly* appear that the winchman did not lower the sugar, but this is not enough.

"Where an event takes place, the real cause of which
" cannot be traced, or is at least not apparent, it ordina-
" rily belongs to that class of occurrences designated as
" purely accidental, and, there being no presumption
" of negligence in such cases, the party who asserts neg-
" ligence must show enough to exclude the case from
" the class mentioned.

"A railroad company owes to one, not a servant of
" the company, who is lawfully engaged in loading a
" car upon its side-track, the duty to have its premises
" in a reasonably safe condition, and to prevent damage
" to him, and others having occasion to transact busi-
" ness with it, from any unseen or unusual danger of
" which it has knowledge or by the exercise of vigilance
" and sagacity should have knowledge.

"The obligation of the railroad company does not
" require it to make its depot and grounds absolutely
" safe, and where the circumstances of the accident sug-
" gest, at first blush, that it may have been unavoidable,
" notwithstanding ordinary care, the plaintiff charging
" negligence must show that the defendant has violated
" a duty incumbent upon it, from which the injury fol-
" lowed in natural sequence.

"The proper inquiry in such cases is not whether the "accident might have been avoided if the company had "anticipated its occurrence, but it is whether, taking "the circumstances as they then existed, the company "was negligent in failing to anticipate and provide "against the occurrence by the use of such reasonable "precautions as would have been adopted by prudent "persons."

Wabash, St. Louis and Pac. Ry. Co. v. *Locke,* 112 Ind. 404.

It is also held in this case that even a jury cannot infer negligence, "but the evidence must affirmatively "establish circumstances from which the inference "fairly arises that the accident resulted from the want "of some precaution which the defendant ought to have "taken."

Without multiplying authorities or elaborating upon the manifest weakness of the testimony of the witnesses for the appellee, we submit there is wanting that definiteness and association and relationship of details which carry conviction when witnesses are truthfully describing an occurrence of this kind. The whole thing savors of an agreed conclusion upon a supposedly material point, which had no foundation in truth. That the fiction is wholly impossible, is nowhere better demonstrated than in the utter inconsistency of the few details that are given with the general conclusion advanced.

Before proceeding to the second proposition we may briefly refer to two matters that came up on the cross-

examination of the winchman. Apparently recognizing that his client's assertion, that there was a sudden lowering of the sugar, had failed, counsel for appellee seems to have shifted his ground, and to have made an effort to show that the winchman ought to have raised the sugar before the accident occurred. But this effort was naturally unavailing, because the testimony all showed, without dispute on the part of his own witnesses, that the winchman had no discretion in the matter, and that his duty was to hold the sugar over the boat until he was ordered to lower it altogether. The whole discretion had to be vested somewhere. It could not be divided. It necessarily had to be lodged in someone on the boat, and was undoubtedly wisely assumed by the boatswain.

We quote:—

"THE COURT. Whose business was it to notify the " winchman to lower the sling-load?

"A. The boatswain's business." (44.)

"Q. You have stated that it was Kia who gave the " signal for the lowering or raising of that sugar, who " else in that boat could give such a signal?

"A. He is the only one who gives this signal. In " very calm times anyone can give the signal to the " winchman." (60.)

Moreover it is the men in the boat, and not the winchman, who are supposed to watch the waves.

"Q. Have you not stated that it was also your busi- " ness to watch the waves?

"A. Everybody is supposed to do that when it is " rough; everybody is supposed to do that." (52)

Furthermore they are the ones who watch the sling-load of sugar.

"A. There is some one to see that the sling-load is " placed right where they want it in the boat. *We* " *watch it all the time.*" (70.)

On the other hand, the winchman had to watch the boat to see what signals were given; he could not watch the waves. He says, and it is undisputed, "*My time is* " *practically taken up with looking at the men in the* " *boat.*" (*200-201.*)

And Captain Nicholson shows the utter impossibility of this witness going outside of his own line of duty to perform that of others:—

"Q. Do you say with your experience as an officer, " and a master of a vessel for ten years, that you cannot " judge as to the height of these waves as they come in?

"A. That is practically the idea, yes.

"Q. Here is a Portuguese winchman, who sees the " boat, and who sees and knows all that he has to do to " raise or lower the sugar is to move the lever, how is " he to judge of the height of these waves coming in " from time to time?

"A. It may not be necessary.

"THE COURT. Why not?

"A. To begin with, on account of the house that this " Portuguese is in. His vision is shut off, so that he " cannot see the big seas coming in, if he could it would " make him nervous. He can just see the boat at the

" landing and not much else. He would not have the " constitution to stand it. Sometimes I was excited " myself.

"Q. Now, do I understand you to say, if with your " experience of thirty years on the sea, including your " ten years as master of a vessel, if you cannot judge of " the height of these waves, I want to know how this " Portuguese winchman, put in charge of this danger- " ous thing, can judge the height of the waves, and " so protect those men underneath." (169.)

After objection:—

"A. My experience and my knowledge is that this " Portuguese cannot see much more than the boat at " the landing. The arc of his horizon is restricted.

"THE COURT. Then you claim that the winchman " was not to blame for this injury?

"A. Not the injury.

"THE COURT. Who was to blame?

"A. I cannot say anybody was to blame. I don't " think that Keau" (Palapala) "was to blame." (*170.*)

The court may not be inclined to agree with the latter conclusion. The court may believe, after it has reviewed the testimony of the witnesses of the appellee, that there was some neglect on the part of the boatswain or the loaders, in connection with the canvas. It is not necessary, however, to our case that the court should so find, because the record is clearly wanting in any proof of negligence on the part of appellant.

Was the Winchman's House Properly Constructed?

There was a fleeting attempt made by counsel for appellee toward the close of the testimony to show by cross-examination that the winchman's house was not properly constructed, but it came to nothing. It is almost unnecessary to refer to the matter at all; but we will do so very briefly:—

"Q. Could not the winchman see from his position, " into the boat?

"A. He could see.

"THE COURT. He was above them, was he?

"A. Yes, he was away up above.

"THE COURT. On the wharf?

"A. He was further above, he can plainly see from " where he was to the boat." (46.)

"Q. A few minutes ago didn't you say, in answer to " a point-blank question, that this winchman could " clearly see the boat?

"A. He could clearly see the boat, yes, there is no " doubt of his seeing the boat, Judge. He could simply " see the boat taking the sugar. The house is built so " that he cannot see my steamer.

"Q. How does the house face?

"A. He looks straight down. He must stand with " his right hand on the lever looking at them, if he " wants to see.

"Q. So the tower is so built that he must look down?

"A. There are four sides, there is no way he can see.

"THE COURT. Was it so built because it would make " him nervous?

"A. I do not know. I say it would make me nervous " to watch. I watched them and it made me very " nervous.

"THE COURT. And you were staying on the deck of " the ship?

"A. Yes." (*170-171.*)

Westoby testifies:—

"Q. Have you looked out of this winch-house?

"A. Yes.

"Q. You can see the place where the boats come in " and the sea out beyond?

"A. Yes." (180.)

The winchman testifies:—

"Q. While you were in the well of the donkey, you " could see the landing and you could see the waves " coming in?

"A. Sometimes I could not see.

"Q. Why not?

"A. When the waves are close to the boat I cannot " see.

"Q. You can see when the weather is awful rough, " you can see the waves coming in, can't you?

"A. Sometimes I can see, and sometimes I don't. " *My time is practically taken up with looking at the* " *men in the boat.*

"Q. Suppose you look, can you see these waves come " in?

"A. Suppose I look, yes.

"Q. There was nothing to prevent your seeing if you " want to; you can see if you want to.

"A. Yes." (*200-201.*)

It is perfectly clear then: First, that the duty of the winchman was exactly performed. Second, that he was not responsible for the men coming in after the sugar in such rough weather, nor for their failure to go out when the waves came in. Nor again for their failure to look up at a time when they were apparently ready to receive the sugar; or for their failure to order the winchman to raise the sugar until their trouble with the canvas was over. All of those matters were within their judgment and discretion, and not his. They knew what they were doing, and what they were going to do, and how long it would take. He was not in a position to exercise discretion, if he had the right to do so, in fact he had no such right. Third, that the appellant cannot be held liable to the appellee for the consequences arising out of a set of circumstances in their nature so wholly accidental. There is nothing looking like actionable negligence anywhere in the case. There is no charge that this servant was incompetent or unfit to do his duty. The whole assertion is that he committed one unusual and accidental act that involved bad judgment, or else that he failed to do all that a person of extraordinary resources and ability might have accomplished at the time. But we do not understand that this kind of a showing will charge the appellant with damages. We had supposed that it was necessary to bring home some specific, tangible reality, involving a lapse of duty due from the appellant to the appellee; some

failure to employ care in the selection of servants or other instrumentalities, which was necessary to the efficient handling of the sugar. Unquestionably there is no attempt to do this. The only effort that was made was to show, in some vague, indefinite, and shifting way that there was something wrong somewhere.

The truth of the matter is readily discernible. The only errors of judgment and the only carelessness that was displayed was on the part of the men in the boat. The captain of the ship may have erred in sending the boat while the sea continued to be so rough; that would be an error that the appellant would not be held responsible for. The boatswain may have erred in going in too soon for cargo—the appellant could not be held responsible for that. The loaders may have been in fault in having gotten their canvas under the first sling-load of sugar by mistake; surely the appellant would not be held responsible for that. They may have been in fault in seeking to pull the canvas out while the boat was under the sling-load of sugar. But for such lack of judgment they alone are responsible. The boatswain may have been at fault for not having noticed the situation of the loaders who were immediately before him. But here, again, the appellant is not responsible. It had no control over the actions and discretion of the boatswain. He took no orders from the winchman or anyone else connected with the plantation. He gave orders rather than received them.

In any event whatever may have been the cause of

the accident, it is perfectly clear that it was due to some error or neglect on the part of some one connected with the boat and not the shore. We confidently believe that the appellant will not be held liable for the unfortunate event.

II.

WAS THE ACCIDENT, IN FACT, CAUSED BY THE NEGLIGENCE OF THE APPELLEE AND HIS FELLOW SERVANTS?

This matter has been gone over to a considerable extent necessarily, in the previous discussion, and it would be a burden upon the court for us to repeat what we have already said. Nevertheless, we feel that it is our duty to briefly but forcibly call the court's attention to that evidence which charges the appellee and his fellow servants with a failure to exercise the reasonable care and caution which ought to have been exercised by them that day.

Brief Recapitulation of Evidence.

The court will remember that by the undisputed evidence the sea was very rough in the morning; that the captain of the ship left Paauhau shortly after four o'clock and went to Wookala, and finding it too rough to work there returned again to Paauhau. (*156.*)

The court will also remember that the coast was very abrupt and rocky (*155*), and always dangerous. (*167.*) At such a place, with the waves dashing against the

rocks (*172*), was it not a reckless proceeding for the captain to have sent the boat to the dock for sugar? (62.)

It must be remembered that the men tried for three successive times to get this particular sling-load of sugar "going in and out," because of the condition of the sea, and that the captain kept them there in spite of the fact that the waves made him nervous as he watched the men working in the boat (*171*) although he was at the time 150 yards away, sitting on the steamer's deck (*171*). No wonder, then, that he himself, who was, perhaps, primarily responsible for the accident, said when asked who was to blame: "I cannot say anybody was to blame." (*170.*)

But this is not the only lack of prudence disclosed by the record. Kia, the boatswain, was clearly imprudent. "The crew took orders from him" (96); he stood in the stern, steering the boat. (51.) The sling-load of sugar was suspended between him and the rowers in the forward end of the boat, and between Palapala on the one side and Samoa on the other. (57, 105.)

It was his duty to give orders to the winchman to raise or lower the sugar. (44, 50.) Now, although occupying such an advantageous position from which he could clearly see all that was before him, he, and all the persons in the boat, failed utterly either to warn the loaders or to signal by hand or mouth to the winchman to raise the sugar.

"Q. You all kept still, did you?

"A. We were doing our work; we didn't say anything " at all.

"Q. You are sure that from the time that Palapala " and Samoa were taking out this canvas from the first " sling-load of sugar until the second sling was hoisted " up by the winchman that no one in the boat called " out.

"A. Nobody called out.

"Q. You mean to say that there was no expression, " no shouting?

"A. No, nobody gave any signal when it was lowered " down or when it was hoisted up again.

"Q. You say there was no shouting being done by " the crew of the boat from the time of getting this " canvas from under the first sling-load until the sugar " was hoisted up again?

"A. No one said a word.

"Q. I am not referring to signals, shouting of any " kind?

"A. No one called out." (58-59.)

It may be that the proximate cause of the injury was his negligence, his lack of ordinary prudence in failing to give an order to the winchman to raise the sugar or to the rowers to pull out while the canvas was being fixed. Or, on the other hand, the loaders themselves may have been to blame. There is certainly enough in the evidence for the appellee to charge them with fault; for it appears that it was their duty to watch the sugar all the time. (70.) That it was their duty to receive the sugar as soon as it came close enough to them to guide it and

trim it to the proper position in the boat (106); that it was their duty to look to the sling-load of sugar and put it in the proper place; to get hold of it when it was right above their heads, and set it in place. (49, 50.)

In this behalf Samoa testifies:—

"Q. What were you doing?

"A. I and Palapala were the ones to receive the "sugar.

"THE COURT. You were to receive the sugar when it "came down in the sling?

"A. Yes.

"Q. You mean when it came down where you could "reach it?

"A. Yes.

"Q. I mean it was over your heads when you held up "your hands to receive it?

"A. Yes, when it was time for us to get hold of it, "when the sling is being lowered, then we set it in "place." (91.)

He also testifies that it was so suspended and in place when the accident occurred, and that the only reason that they did not receive it was because they were working on the canvas. (94, 95.)

Now, if the sugar was placed and held exactly in the right position, and the sea was comparatively smooth at the time, subject, however, to the constant danger of a blind roller coming in, ought they not, if they were not immediately ready to receive the sugar, to have asked the boatswain to notify the winchman to

raise it, or to direct the oarsmen to row out to a place of safety until the trouble with the canvas was over? This leads us to the last subdivision of this part of the argument, namely,

The Trouble with the Canvas.

By the testimony of all of the witnesses for the appellee the accident was caused by some trouble with the canvas. They had put one sling-load of sugar in the boat. It was laid lengthwise (69) on the left side. (92.) This second sling-load was to have been laid alongside of it on the right side. The boat carries two canvases, one on the right and the other on the left; the object being to have each sling-load of sugar covered. But, "through some mistake," the second canvas or tarpaulin was caught by the first sling-load, and the two loaders were engaged in getting the second tarpaulin free, when the appellee came in contact with the sugar. This statement is taken from the testimony of the appellee himself, and will be found at page 129 of the record.

He also says that at that time the boat was not very steady; it was going forward and back through the action of the waves. His fellow loader, however, did not agree with him on this particular point. He says that the boat was steady. (94.)

Now with the boat free upon the water, and the sling-load of sugar weighing half a ton suspended over it in the exact position for lowering, and everything in ap-

parent readiness for the "lowering altogether," these two men, without any notice as to what they were going to do, or how long it would take, given either to the boatswain or to the winchman, stooped down, and continued thus until suddenly, by the action of the waves, one of them was brought in contact with the mass of sugar suspended over them, and the question is, were they neglectful?

It would seem that if this statement is correct, there can be no doubt of it. That it is correct is amply shown by the testimony already given, taken in connection with what follows.

We now quote: Hina says, "The canvas cover had gotten under the first sling-load of sugar, they were trying to get it from under to put over the side of the boat." He then testifies that Palapala had no warning at all from anyone. Showing, first, that he was in need of warning, and, second, that his fellow-servants failed to give him any. Hina also testifies that Palapala had just pulled up this cover, and had commenced to stand up when he was struck by the sling-load of sugar. And here it may be noted that the witness does not say "when he was crushed by the sling-load of sugar," or "when the sling-load of sugar fell upon him," but "when he was struck," indicating not a lowering of the sugar, but a contact with it. (54-55.)

The picture is quite clear then. This man was stooping over looking down at a time when he ought not to have been. He was inattentive, probably because of his confidence in the apparent calmness of the sea, with

whose action he felt familiar. He rises thoughtlessly, and before he or anyone else realizes how stealthily the waters have come in, he is forced against the weight above him, and the accident has occurred.

Kewiki says that Palapala was standing in no particular place, he was always "*here and there in the boat,*" (68) indicating that the winchman could not know what he was going to do next,—he was in this position one minute, he would not be there the next. The winchman could not raise and lower the sugar to suit the movements of this man who was skipping about the boat, now working down, now working up, now forward, now aft. His duty was to keep the sugar in place. Palapala looked out for himself.

Kewiki is asked the question, "Now, at the time of " the accident, which way was he facing, towards the " landing or towards the inside of the boat?

"A. He was not facing either way, he was fixing the " canvas which was under the sling-load of sugar.

"Q. You mean he was looking into the bottom of the " boat fixing the canvas?

"A. Yes." (68-69.)

Samoa testifies:—

"We were trying to get the canvas from under the " first sling-load of sugar, and we were looking at that." * * * "We were standing upright then, trying to " pull the canvas out from under the first sling-load of " sugar when Palapala was struck." * * * "I was " standing up, but the work is down, so I had to look " down.

"Q. Palapala and you were engaged at the same "work at that time?

"A. Yes." (93.)

Kia says, that they were stooping down to get this canvas from under the sling. (103.)

Palapala says: "I was stooping down fixing the can- "vas to put it to the side of the boat. When I stood up "the sling-load struck me." (128.)

Thus all of the witnesses for the appellee testify that the appellee was looking down working on the canvas when the accident occurred. It is also clear that from their failure to call his attention to his danger, although they all saw him and knew that the sugar was suspended over him, they relied implicitly upon his ability to take care of himself. It is also clear that it was his failure to do so that caused the accident. He took a chance and it went against him, and while we may not believe that he was recklessly negligent, he certainly was not using the due care and caution which the situation required. In any event he is certainly more at fault than was the winchman, who, like the members of the crew of the boat, readily believed that as long as he performed his duty, Palapala would look out for himself.

III.

WE BELIEVE WE HAVE DEMONSTRATED THAT THERE WAS NO SHOWING OF NEGLIGENCE ON THE PART OF THE APPELLANT, BUT EVEN IF NEGLIGENCE HAD BEEN SHOWN THE DAMAGES AWARDED WERE CLEARLY EXCESSIVE. MOREOVER, THE TESTIMONY WAS OF SUCH A NATURE THAT THE COURT OUGHT NOT TO HAVE ATTEMPTED TO BASE AN AWARD UPON IT. WE BELIEVE THAT THIS COURT WILL FIND, IF IT EVER REACHES THE INQUIRY AT ALL, THAT FURTHER TESTIMONY MUST BE TAKEN BEFORE IT CAN KNOW THE REAL EXTENT OF THE INJURY SUSTAINED BY THE APPELLEE.

The record shows nothing more than an ordinary breaking of the collar bone, with a little bruise about it. The appellee testifies in answer to the question, "What was the effect of the blow?":—

"A. I was hurt, I felt as if I was out of breath." * * * "My feeling at that time was that I had "fallen."

"Q. Were one of your bones broken?

"A. Yes.

"Q. What bone?

"A. Collar bone.

"Q. What, if anything, was the effect of this blow or " you? Pain in any way? Physical pain?

"A. Well, when I was brought back to Honolulu I " was taken to the Queen's Hospital. The collar bone " had been paining me and I had pains in the shoulder. " This does not pain me all the time; some days I am " all right and sometimes it pains me off and on." (116.)

* * * *

"Q. Will you describe that pain?

"A. I did feel the pain at that time."

* * * *

"Q. This pain you say you felt when you went to " the captain's room on board the ship, did that pain " affect you in any way?

"A. It did not." (117.)

The witness having testified that it had no ill effect, counsel repeated his question, presumably with emphasis:—

"Q. What other effect, if any, did this pain you " speak of in your shoulder—what other effect did it " have upon you?

"A. My body all over was in pain.

"Q. How was it at night?

"A. At night time it pained me so that I could not " sleep.

"THE COURT. Not now?

"A. No, not at the present time, but I still have pain " in my shoulder.

"THE COURT. Right after the injury did it pain you " at night?

"A. Yes.

"Q. How long after you arrived at the Queen's Hos-
" pital did these pains continue?

"A. About three weeks after I arrived at the hospital
" my pain kind of eased off—pain in the collar bone.

"Q. Then after that time you experienced no other
" pain?

"A. I have had pain in my shoulder, not continual
" pain, but at times off and on.

"Q. How long after the first pain was it when the
" second pain started in your shoulder?

"A. I think a week after the pain went away from
" the broken collar bone that pain appeared in my
" shoulder." (118.)

He adds that sometimes when walking in the street and shifting his hand "when I jerked it" a pain started, and sometimes that it would pain all day and night and the next day, and then the pain would leave him. (118-119.)

This is the substance of his testimony, on the direct, and shows, we submit, nothing more than a simple fracture of the collar bone, with the attendant knitting pains, which he does not say were severe, or of any unusual character.

He testifies on cross-examination that a new bandage was put on at the Queen's Hospital, and that both the bandages together were on for a period of three weeks, when they were taken off. The accident occurred on the 19th of March, and the witness was on the stand

testifying on the 8th of May, being seven weeks after the accident occurred.

It would be perfectly natural that there should be temporary pains lasting awhile and going away again at such times as he jerked his arm that soon after the fracture. There was nothing in this testimony to indicate anything approaching complication, and nothing to show that it was anything more than a simple fracture of the collar bone.

The next witness was a doctor, one F. H. Humphris, who testified that he had made an examination, "As " thorough as I thought necessary." He said, after the injury had been described to him, when asked in regard to the pain, "The pain will be severe probably"; after which all the rest of his testimony is negative. He does not say that, in his judgment, the conditions indicate neuralgia or tubercular joint. He simply says that it *might be* the beginning of a tubercular joint; it *might be* neuralgia of the joint.

"Of course if it were tubercular it *might mean* his " losing the arm, his losing the shoulder joint, and even " the loss of his life!" In other words, it might mean anything that the imagination could picture. But judgments are not passed on such imaginings. It requires something more than a "might be" to sustain a verdict for a large amount of damage.

Now it appears that on the following day something peculiar appeared in the condition of the appellee, which this doctor did not at the time understand, and upon which he does not say anything serious has oc-

curred, but he goes on saying it *might* occur. This is the whole substance of his testimony, and he was the only professional man called for the appellee.

Now since the trial there have been filed affidavits showing by the positive testimony of disinterested witnesses, that the appellee has been able to perform all ordinary duties, as well as to enjoy healthy and manly sports; in other words, he can now do anything and everything that a wholly sound man might wish to do. He has worked as a stevedore at two dollars a day, seventy-five cents more than he received as a sailor; he has worked thus repeatedly since the trial. And for five days in the month of August he worked scraping the hull of the "Kinau," and has sought regular employment as a sailor, representing that he was fit to perform said services. He has also played baseball, using both arms and hands, pitching, fielding, and catching in said game. These facts are set forth in detail in the affidavits filed in support of the motion for leave to take and introduce new evidence, now pending and undecided in this court. They are of such a nature as to remove all doubt as to the physical condition of the appellee, which on the last day of the trial was apparently such as to render uncertain the exact effect of his injuries.

There is also attached to the motion, and made a part thereof, the affidavit of Doctor Wood, a physician and surgeon of Honolulu, who says upon the additional testimony contained in the foregoing affidavits, that it is his opinion that the condition of the appellee on the last

day of the trial was caused, not by his injuries, but by a probable attack of dengue fever, which was at the time epidemic in Honolulu.

It is true that some of the facts stated in the affidavits filed by the appellant in support of its said motion are denied in affidavits filed by the appellee. But there is apparent inconsistency in the tenor of the two affidavits filed by the appellee.

In the appellee's affidavit of the 6th of October, 1903, he says that he tried to do some work on July 27, 1903, and on or about September 14, 1903; he then says:—

"These two occasions represent the sum total of my "attempts at stevedoring; between them, I made no "attempt at such work, and since the second occasion I "have not attempted any. On neither of these occasions "did I attempt anything arduous or laborious, either "in itself, or as compared with the duties of my calling "as a sailor. In his affidavit Fern says that my earning "capacity since July 27th has been equal to my earning "capacity prior to March 19th, 1903; but the facts "are that prior to March 19th, 1903, my earning capaci-"ty produced $7.50 per week and my board, whereas, "my attempts at work on the two occasions referred to, "they constituting the whole of the stevedoring that "Fern seeks to make so much of, has produced the "total sum of $4.00, and no more."

It will be seen that the attempt is made to throw out an inference that all the work done by the appellee during the time referred to was the two days for which he received $4.00.

Now in the affidavit of Fern, subscribed to on the

23d of October, 1903, attached to the motion filed by the appellant in this court, are the following specific allegations:—

"That on the 27th day of July, 1903, the said Palapala applied to deponent for work as a stevedore, and then represented to deponent that he had completely recovered from his injury sustained on the said 19th day of March, and thereupon deponent gave him employment as a stevedore, and said Palapala worked at such employment for the said corporation on July 27th, August 3d, 7th, and 8th, 1903; that from the tenth to the fifteenth of August, 1903, inclusive, the said steamship 'Kinau' was placed and remained upon the dry dock in Honolulu for a general overhauling, and during such period the said Palapala was daily employed with others in cleaning (chiseling off rust, etc.) and repainting the hull of said steamer; that the said Palapala was employed as a stevedore on the 18th day of August, 1903, on the said steamship 'Maue,' and on August 25th, 1903, on the said steamships 'Helene' and 'Maui,' working not only during the regular hours of labor but also overtime, and that on September 10th, 21st, 22d, and October 8th, 1903, he worked as a stevedore on the said steamship 'Helene.'

* * * *

"That the said Palapala has on several occasions since the 27th day of July, A. D. 1903, requested deponent to give him regular employment as a sailor, that deponent has hitherto been unable to provide the said Palapala with such employment on the vessel on which he desires work;

"That on several occasions since the 8th day of Oc-
" tober, A. D. 1903, the said Palapala has been offered
" work as a stevedore by deponent, but the said Palapala
" has since said date refused to work;

"That deponent about three weeks ago organized a
" baseball team from among the sailors and stevedores
" employed on Inter Island steamships, and the said
" Palapala has regularly up to the 19th day of October,
" 1903, practiced daily with the said team during the
" noon hour and between the hours of five and six P. M.,
" the usual practice hours, and has used both arms and
" both hands in pitching, fielding and catching in the
" said game;

" That the work of stevedore, including the loading
" and discharging of ships, in which the said Palapala
" has been engaged for the said corporation since the
" 27th day of July, 1903, as aforesaid, is of an arduous
" and laborious nature, requiring considerable physical
" strength and endurance; that said deponent has seen
" the said Palapala during his employment since July
" 27th, 1903, as aforesaid, lifting and carrying heavy
" weights, weighing 125 pounds and upward, apparent-
" ly as easily as he has ever done prior to the 19th day
" of March, 1903;

"That the deponent knows that the said Palapala is
" in sound physical condition and is competent physical-
" ly to work as he was prior to the 19th day of March,
" 1903;

"That said Palapala has since the 27th day of July,
" 1903, worked the full working day of nine hours when
" employed as a stevedore as aforesaid, and has received
" as wages the sum of $2 per day and 50 cents per hour
" for over time for such work."

The above allegations are also supported by the affidavit of M. G. K. Hopkins, also an employee of the Wilder Steamship Company.

Now in the affidavit of the appellee, subscribed to on the 27th day of October, 1903, he makes no answer to the first specific allegations quoted above, and admits that he did the scraping on the "Kinau," and merely seeks to explain his evasion of the subject in his former affidavit. With reference to the ball games, he says: " Fern's reference to the baseball game I am compelled " to pronounce a gross exaggeration."

Following which he denies specifically having played at the game as a member of the team, although he admits that he was there looking on and tossed the ball back at times when it came near him.

The affidavits in connection with the court's knowledge of such matters demonstrate one thing, and that is, that upon depositions, where examination and cross-examination can be had, satisfactory proof can now be taken as to the true effect of the injuries the appellee received, and that is all that we ask to have done in the event that the court reaches the inquiry at all.

We will not take up the time of the court by repeating the argument, or renewing the citations that have already been presented in a former brief filed herein, to the effect that the judgment of the trial court was greatly in excess of judgments usually given for such injuries as the appellee received. We do not believe that this court will ever consider this question at all.

We most confidently believe that the court will find that there was no negligence on the part of the appellant, and that the appellee himself, together with his fellow servants, was at fault. But if the court should not agree with us, we do not see how it is possible on the evidence adduced in the court below to arrive at any satisfactory and intelligent answer, as to what award should be made to the appellee for damages sustained, and, therefore, it becomes absolutely necessary, if the inquiry is reached at all, to issue an order for the taking of depositions, which will exclude all speculation, and reduce the inquiry to the field of certainty, and place the court in possession of facts, instead of surmises.

Reference to the Opinion of the Trial Judge, and Conclusion of Argument.

We have not heretofore referred to the attitude of the trial judge, nor to his opinion filed herein. We have been impressed, on examination of the record, with the conviction that the trial judge was greatly affected by the fact that the appellee was hurt, and that his sympathies were keenly aroused in his favor.

The opinion, on the other hand, shows clearly that he was greatly in doubt as to all the issues, but chose to resolve them in favor of the appellee.

After stating the claim of the libelant to the effect that the winchman neglectfully and without warning " let go of the sling-load of sugar before the crew in the " boat were given the signal," and the claim of the re-

spondent that the sugar was suspended over the water and not lowered by the winchman, the court puts the following question:—

"Was the accident the result of the negligence of the "winchman in letting go the sling-load of sugar without "notice from the crew in the boat, or was it the result "of a big wave which thrust the boat up towards the "suspended sling-load of sugar and thus caused the "injury to the libelant?" (237-238.)

The opinion proceeds:—

"It was the custom, as shown by the uncontradicted "evidence in this case, for the man in charge of the "winch on the wharf at Paauhau, to suspend the sling-"load of sugar over the boat which was to receive it, "and hold it there until he got a signal from the crew "in the boat that they were ready for the sugar, when "he slowly lowered it into the boat, two of the crew "usually 'trimming' it in the technical language used, "or steadying it gradually into place. (238.) * * *

"That the business of transferring sugar from the "landing at Paauhau to vessels lying out in the open "sea is a dangerous one, because of the methods em-"ployed and the conditions surrounding the transac-"tion, is clear; and especially is this so when the weather "is stormy and the sea consequently rough, rendering "more than usual care necessary in the handling of the "instrumentalities employed." (238.)

Whereupon the court refers to some of the evidence as to the condition of the sea, and seems to arrive at the conclusion that it was comparatively smooth, which we submit was erroneous; but even were it otherwise, it

would not affect the real question to be determined, which was not as to the general condition of the sea, but whether a "blind roller" rose unexpectedly at a time when the loaders were taking an unwarranted chance in looking down when they ought to have been looking up, or in remaining under the suspended sling-load of sugar when they ought either to have had it raised, or else have had the boat rowed to a place of safety.

The court having referred with approval to the act of the winchman raising the sugar immediately upon the injury occurring, and to the conflict in the testimony, of the witnesses for the appellant and the appellee, as to whether the appellee had risen and stretched forth his hands at the time of the accident, as testified to by the witnesses for the appellant, or had merely straightened up, as testified to by the witnesses for the appellee, declares its belief in the theory advanced by the witnesses for the appellee, and concludes that in its opinion "the " injury was not caused by the boat being raised up on " a big wave, but that it resulted from the careless and " negligent act of the winchman in suddenly lowering " the sling-load of sugar without warning, and before " any signal had been given from the man in the boat." (246.)

The court grounds its opinion upon a belief that the sugar fell upon the appellee, rather than that he was struck by contact with it. In other words, the opinion will be found to rest upon a lowering down rather than a striking. (See 244.) But, we submit, this conclusion is not supported by the record.

Hina says:

"It *struck* him right on the breast." (45.)

"Q. Up to the time it *struck* you heard no warning "either by members of the crew of the boat or by the "winchman?

"A. None at all." (54-55.)

"Q. Who was commencing to rise?

"A. Palapala. He had just pulled up this cover just "lying alongside and commenced to stand up when "he was *struck* by this sling-load of sugar.

"Q. Where did you say he was *struck*?

"A. Right on the breast here. (Indicating.)

"Q. After he had been *struck,* what was the next "thing done?

"A. The Portuguese, the winchman, he hoisted it up "again and Bob got hold of Palapala." (55.)

On page 56 there is a single exception; the witness makes a statement to the effect that the sling-load fell on him on the edge of the boat, but this is immediately followed by testimony which is wholly inconsistent with the possibility of such a falling:

"Q. Is it not a fact that he was in the boat, and that "he was knocked with his back on the edge of the boat?

"A. Yes, that is the time that he was knocked down "with the sling-load of sugar. He was knocked down "on to the edge of the boat and then fell into the boat." (56.)

Moreover, as heretofore pointed out, a falling mass like half a ton of sugar would not strike a man on the

breast, especially if he was stooping over. It would strike him on the head, back or shoulder. This, to us, is one of the strongest reasons for asserting that the witnesses for appellant were right when they say that the appellee was thrust upward against the sugar at a time when he was just in the act of stretching out his hands.

Again, Hina testified, when asked what cry that was Palapala gave:

"Q. What did he say?

"A. Just *when he was struck* the *force*" (not the weight) "of the sling-load made him give a kind of a "grunt." (60.)

This again indicates a swinging blow, and not a falling down. So, too, counsel for appellee never assumes a falling, always assumes a striking. We quote:—

"Q. I will ask you whether you saw the sugar at the "time that it struck Sam?" (63.)

"Q. Now, when this sugar struck the libelant, what "became of the sugar?" (64.)

"Q. Between the point of time, when the sugar "struck Palapala, etc." (65.)

"Q. How soon after the sling-load of sugar struck "Palapala was it that the winchman hoisted it up?" (65.)

"Q. Give your best recollection as to the interval between the time the sling-load struck him, etc.," (65.)

All of these questions, and many others, indicate that counsel for appellee understood there was a striking,

and not a falling. So, too, the witness Kewiki distinctly disclaims a falling. He says: "He was struck by the "sling-load, then he fell into the boat and laid there "as if he was dead." Indicating a striking of the sugar and a falling of the man.

It hardly seems right to refer to the testimony of the other witnesses for the appellee, for each of them disclaims having seen the sugar at the time of the accident. For instance Samoa says:—

"THE COURT. And you did n't see it coming down "until it struck Palapala?

"A. We did not know it until Palapala was struck." (92.)

"Q. How was it that you did not see the sling-load "until it struck Palapala?

"A. I was busy at my work." (93.)

Kia says:—

"Q. Did I understand you to say that you did not "see the sugar descend until it actually struck Pala-"pala?

"A. No.

"Q. Is that right?

"A. Yes, it is." (105.)

Palapala testifies that he was struck, not crushed, "*struck* right in front here." A singular place, as we have repeatedly said, for a falling load to come in contact with a man. But later he too, it will be remembered, disclaims having seen the sugar moving at the time it struck him. (127.)

The witnesses for appellant, it will be remembered, positively deny that the sugar was lowered. Now, taking all this testimony together, we submit that it is impossible to find that the plaintiff has maintained the burden of showing that there was a falling or lowering of the sugar at the time of the accident, and therefore, that the trial court was mistaken in its conclusion that there was negligence shown on the part of the appellant.

We also submit, with all due deference, that the trial court was clearly wrong in making an award without further light; and we earnestly ask this court, if it shall not agree with us upon the question of negligence, to permit us to show the actual extent of the injuries sustained by the appellee, as we can now do, as sufficient time has elapsed since the injury was sustained, it now being about ten months since the accident occurred, while the trial took place within seven weeks.

We trust and believe, however, that this will not be necessary, as we are very confident that this court will exonerate the appellant and will find that it exercised all proper care at the time of the accident.

Respectfully submitted,

HOLMES & STANLEY,
MORRISON & COPE,
Proctors for Appellant.

CHARLES B. MARX,
R. D. SILLIMAN,
Of Counsel.

No. 981.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

IN ADMIRALTY.

PAAUHAU SUGAR PLANTATION COMPANY, a corporation,

Appellant,

vs.

SAMUEL PALAPALA,

Appellee.

BRIEF OF APPELLEE.

PAGE, MCCUTCHEN & KNIGHT and
J. J. DUNNE,

Proctors for Appellee.

Pernau Press.

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Appellee.

BRIEF OF APPELLEE.

The learned counsel for appellant in their statement of the facts of this case, failed to mention, as found by the court below, that at the time appellee received his injuries, the winchman on the wharf, one of appellant's employes, was not "holding it" (the sling load of sugar), "awaiting a signal from the crew in the boat to let the "sugar descend into the boat", but had rapidly lowered the sugar into the boat which contained appellee, without awaiting the signal therefor, thereby causing the injuries

complained of; and these injuries were shown to the trial court to have been far greater than a "broken collar bone "and bruises" (appellant's brief, page 3). The testimony shows that these injuries gave evidence of being permanent in their character and of a nature likely to interfere seriously, and for the immediate future totally, with libellant's capacity to earn a livelihood.

I.

The first point raised by appellant is concerned with *libellant's age.* The court will observe that this objection was not presented in any form whatsoever in the court below, and therefore cannot be considered here.

> *Flournoy v. Lastrape's,* 9 Otto 25 L. ed. 406;
> *Wasatch Mfg. Co. v. Crescent Min. Co.,* 148 U. S. 293.

It was never there contended that libellant did not have the legal capacity to maintain this action. No plea in abatement based upon his alleged minority was ever there interposed nor do we find any assignment of error asserting this objection. Said the United States District Court for the Eastern District of Pennsylvania upon this point, in the case in admiralty of

> *Knight v. The Attila,* Fed. Cas. 7,881,
>
> "If it appears on the face of the libel that the libellant is not entitled to sue, as in the case of an infant or a married woman, the respondent may demur; *but if the incapacity does not appear in the libel, although true in point of fact, then the respondent must take advantage of it by pleading in bar or by answer.*"

In the Hawaiian case of

Chin Hee v. Ho Yam Ke, 8 Hawaiian Rep. 285,

the question of infancy was properly raised by a plea in abatement. Had it been raised during the trial, it would have been proper for the court below to have appointed a guardian *ad litem* for the libellant, if shown to be under legal age, and to have then further proceeded with the trial.

The first assignment does not necessarily indicate an objection on appellant's part that libellant did not have the legal capacity to sue. It goes to the determination of the fact found by the court below respecting his age, presumably as a factor in the determination of the amount of damages awarded him. Had the court found that he was 20 or 21 years of age when the evidence showed he was 50 years or thereabouts, appellant might properly complain under its first assignment of error because this difference in age would tend to materially affect the extent to which libellant had been financially injured by appellant's negligence. Of what practical difference is it, however, in the determination of this question, in view of the evidence, whether libellant was in his twenty-first year and within a couple of months of being twenty-one years of age when he was injured or had actually passed his twenty-first birthday shortly thereafter. The distinction is too infinitesimal to be of moment in fixing the amount of damages in the decree and the trial court must have so recognized it in holding that "the libel- " lant was at the time of the injury some twenty-one years " of age, a strong, healthy man," etc. (transcript, p. 237).

We understand that the learned counsel contend that generally "admiralty courts conform to the course of "practice prevailing in other" (*i. e.* local) "courts in "respect to parties disqualified from suing in their own "right" (Brief, p. 4); but in asserting that "it is "also clear that the libellant was a minor at the time of "the trial, and consequently could not bring this libel in "his own name, but should have done so by guardian or "his father", they have overlooked the Hawaiian law upon this subject. The *Civil Laws of that Territory,* edition of 1897, provide, in Chapter 136, as follows:

"LEGAL MAJORITY.

"§ 2144. All male persons residing in this Republic, who shall have attained the age of *twenty* years, and all females who shall have attained the age of eighteen years, shall be regarded as of legal age, and their period of minority to have ceased."

See *Wood v. Green,* 2 Haw. Rep. 168.

It may be finally suggested, upon this point, if appellant still insists on raising the question of appellee's legal capacity to sue that, as the former insists that admiralty causes on appeal to this court are tried *de novo,* involving thereby an unqualified review of the appeal thereof, appellee has certainly now attained his majority and thereby become of legal capacity to maintain the action, and the services of a guardian *ad litem* are therefore unnecessary. Consequently, as the suggestion concerning his age first originated here, this court can dispose of it as of the present time, having reference to the legal qualifications of the libellant now rather than as of an earlier time.

II.

The second point urged by appellant's counsel is concerned with the question of the *winchman's negligence.* We submit that the testimony fully warranted the finding by the trial court that:

"After a careful consideration of all the testimony "in the case, I am of opinion that the injury was not "caused by the boat being raised up on a big wave, but "that it resulted from the careless and negligent act of "the winchman in suddenly lowering the sling load of "sugar without warning, and before any signal had "been given from the man in the boat.

"The winchman was an employee of the respondent "engaged in the prosecution of its work, and as such "employee, the respondent is charged with responsi- "bility for his careless and negligent acts done in "the course of his employment and resulting in the "injury to libellant."

Appellant's contention is that the roughness of the water caused the boat into which sugar was being loaded to suddenly change its position and bring libelant into contact with the suspended bags of sugar which it claims had not immediately theretofore been lowered into or towards the boat.

No question has arisen nor doubt suggested respecting appellant's liability for the act of the winchman, and we shall presume that it is conceded the act of the winchman done in the course of his employment or prosecution

of his business was the act of the Plantation Company which employed him. Nor is there any contention that the management of the winch and machinery employed in the handling and transportation of the sugar from the wharf to the steamer's small boat was not in appellant's exclusive control, which is a fact of considerable importance.

Miller v. O. S. S. Co, 118 N. Y. 199, 208-9;
Cummings v. N. F. Co., 60 Wis. 612;
The Rob't Lewers, 114 Fed. 849.

It may be further observed that the testimony of the sailors called by libellant to which we shall shortly refer is entitled to the same full credence by this court as was accorded it by the court below. The interest of these witnesses would tempt them to color their testimony in appellants' behalf, were they so inclined; for all of them were sailors in the employ of the Wilder S. S. Co. which furnished during the trial two witnesses—its president and Capt. Nicholson—for appellant, and two affidavits in support of the latter's motion to reopen this cause, and whose relations with the Sugar Company were apparently very close. In fact, during the trial the court told libellant's counsel he would be permitted to amend his libel by making the Wilder S. S. Co. a party defendant, if he were so advised (transcript, p. 170). Therefore, we say, it was to the interests of the men who were in the boat with libellant when he was injured to make their version of the affair as favorable as possible for appellant.

Let us look at the testimony upon the subject of negligence.

Hina, one of the libellant's witnesses, who was in the same boat with him at the time of the accident, said when directly examined concerning the sugar:

"It was lowered half way down, but it was not to "be lowered to the boat before we gave the signal, but "before we gave the signal it was lowered and he was "hurt then.

"Q. How did he get hurt?

"A. By the sugar. As the sugar was lowered half-"way down, Sam Palapala and myself were covering "the first load with canvas and before we had it cov-"ered and before we notified them, the men in charge of "the winch lowered it.

"The COURT. Whose business was it to notify the "winchman to lower the sling load?

"A. The boatswain's business.

"The COURT. Who is the boatswain?

"A. Kia, the one at the back of the boat. He is the "one who signals when a large sling load is to be lowered.

"The COURT. He swears he did not signal him, does "he?

"A. No signal was given at all" (transcript, p. 44).

He further testified that the sling load of sugar struck libellant right on the breast, whereby

"He fell down, with his face up, on the port side, just "as they hoisted the sugar up again".

There was

"no notification at all from the boat" (transcript, p. 45). He further testified that the winchman could plainly see from his position into the boat, as he was above them.

On cross examination this witness said:

"When they are ready to put it" (the sling load of sugar) "in place, the one in the back of the boat is the "one who notifies the winchman to lower it down.

* * *

"As soon as the sling load is right above, where "they can catch hold, if they want it front or back, "they take their hands and try to get it just where they "want it, then the boatswain gives the order to lower "it when they are ready. * * *

"After the sling load of sugar leaves the wharf "and is carried out on the derrick it is lowered down by "the winchman half way. This is way above the men's "heads and he holds it there until the boatswain gives "the signal to lower it" (transcript, pp. 50-51).

The record upon his further cross examination shows:

"Q. I want to know what the winchman did?

"A. He lowered the sling load of sugar without being "notified to do so.

"Q. You say Palapala was one of the men whose "duty it was to receive the sling load, to take hold of it "when it got within a certain distance?

"A. Yes.

"Q. Whereabouts in the boat was Palapala at the time "the accident occurred?

"A. He was near the middle of the boat at the time "he met with the accident. In the middle, but a little "toward the stern. * * *

"Q. What was he doing at the time the accident oc-"curred?

" A. They had not gotten through fixing up the first " sling load of sugar they had received. They were " working on it.

" Q. What were they doing to it?

" A. They were covering it. The canvas cover had " gotten under the first sling load of sugar and they were " trying to get it from under to put it over the side of " the boat.

" Q. Palapala had no warning that that sling load of " sugar was coming?

" A. No.

" Q. No warning at all?

" A. No.

" Q. No warning from the crew of the boat or by the " winchman?

" A. No; he did not expect they would lower the sling " load of sugar.

" Q. Up to the time it struck you heard no warning " either by members of the crew of the boat or by the " winchman?

" A. None at all.

" Q. How quickly did it happen?

" A. At quite a short time. He was just commencing " to rise.

" Q. Who was commencing to rise?

" A. Palapala. He had just pulled up this cover " just lying alongside and commenced to stand up when " he was struck by this sling load of sugar.

" Q. Where did you say he was struck?

" A. Right on the breast here (indicating) (transcript, pp. 53-5).

* * *

"Q. On this occasion when Palapala was struck, how "far toward the bottom of the boat did this sugar de- "scend?

"A. The sling load fell on him on the edge of the "boat, when it was hoisted up again he fell in the bottom "of the boat" (transcript, p. 56).

* * *

"Nobody called out to the winchman. * * *

"Nobody called out. * * *

"Nobody gave any signal when it was lowered down "or when it was hoisted up again. * * *

"No one said a word. * * *

"No one called out. * * *

"No one of us called out. * * *

"No, no one of us called out" (transcript, pp. 58-9).

Kewiki, another one of libellant's witnesses, testified on his direct examination:

"Q. How did it come about, that the second sling "load of sugar should hurt this man?

"A. It was on account of the winchman lowering the "sling load of sugar without being notified to do so. * *

"Q. What we want to know is, at the time when it "struck Palapala, did it come down, fast or slow, how "did it come down?

"A. It came down very fast. * * *

"A. I saw the sling load of sugar. I saw it when "Palapala was hurt.

"Q. Where did it strike him?

"A. On the chest here (indicating) (transcript, p. 63).

He further testified:

" Q. Now, when this sugar struck the libellant, what " became of the sugar?

" A. The winchman hoisted it up again.

" The COURT. That is, the winchman hoisted it up, is " that so?

" A. Yes, sir.

"The COURT. Could the winchman see that boat, from " his place at the winch?

" A. Yes, he can see.

" The COURT. The winchman could see the libellant " when he was hurt?

" A. He can see. * * *

" Q. How soon after the sling load of sugar struck " Palapala was it that the winchman hoisted it up?

" A. I can see it, the bags of sugar rest on him and " were hoisted up again. * * *

" Q. Between the point of time when the sugar struck " him, and the point of time when the winchman hoisted " the sugar off Palapala, do you know whether anything " was said by anybody in that boat, to that winchman?

" A. No one of us called out.

" The COURT. Whether nothing was said?

" A. No" (transcript, pp. 64-6).

Upon cross examination he said:

" Q. Now, at the time of the accident, which way " was he (the libellant) facing, towards the landing or " towards the inside of the boat?

" A. He was not facing either way. He was fixing " the canvas, which was under the sling load of sugar.

" Q. You mean he was looking into the bottom of the " boat, fixing the canvas?

" A. Yes. * * *

" Q. How many sling loads of sugar were in the boat " at the time of the accident?

" A. One.

" Q. In what position in that boat was the sling load, " crossways or lengthways of the boat?

" A. Lengthways of the boat" (transcript, pp. 68-9).

* * *

" Q (to the interpreter). Tell him the Court wants " to know how fast—if that sling load, that is charged " with injuring this man, whether it came down so fast, " that the two men who stood in the boat could not catch " it and regulate it?

" A. Yes, it came down very fast.

" The COURT. Did it come down so fast that the two " men, who were to catch the sling load as it dropped " down—did it come so fast that they could not catch it " and guide it into the boat?

" A. Yes" (transcript, pp. 75-6).

Bob Samoa, the next witness called on libellant's behalf, testified upon his direct examination:

" Q. Just describe, in your own way, how it was that " Palapala got injured on that occasion?

" A. We were on the boat, and the boat was shifting " out and in, out and in, when this sling load of sugar fell.

" Q. Just before this sling load of sugar fell, what, if " anything was said or done, by the men on the boat?

" A. Somebody was hurt. There was nothing said.

"Q. Do you know how many bags of sugar there "were in that sling load?

"A. Ten bags.

"Q. Can you state what the weight was of each bag?

"A. One hundred and twenty-five.

"The COURT. One hundred and twenty-five pounds, "you mean?

"A. Yes.

"The COURT. In each bag?

"A. Yes. * * *

"A. It" (the sling load of sugar) "is kept there until "the boat is right under it when he lowers it down into "the boat.

"Q. When is that done?

"A. When some one calls out to lower it.

"Q. Calls out to whom?

"A. The winchman.

"Q. On the occasion when Palapala got hurt, had "anybody called out to the winchman, to drop the sugar?

"A. No one called out.

"Q. When the sugar fell, where did the sugar strike "him?

"A. Right on the breast (indicating his right breast).

"Q. How did that sugar come down? Fast or slow?

"A. Very fast. * * *

"Q. What became of the sugar?

"A. It was hoisted up again.

"Q. Who hoisted it up?

"A. The winchman.

"Q. Had any signal been given by anybody in the "boat, to the winchman to hoist up that sugar?

"A. No.

"Q. Can the winchman see the boat from the place "where the apparatus is, the winch?

"A. He can" (transcript, pp. 82-3).

* * *

"A. It was the falling of the sugar into the boat that "hurt Palapala" (transcript, p. 85).

Upon his cross examination Samoa testified as follows:

"The COURT. I ask you whether the sling came down "so fast that you could not take hold of it and regulate "its fall?

"A. It did.

"The COURT. Why?

"A. In the first place, we didn't know the winchman "was going to lower the sugar, as we didn't give him the "signal. In the second place, it came so quickly we "didn't know it was coming.

"Q. I understand you did not know it was coming "until it struck Palapala?

"A. Yes.

"The COURT. It came down very fast?

"A. Yes.

"The COURT. And you didn't see it coming down "until it struck Palapala?

"A. We did not know it until Palapala was struck" (transcript, p. 92).

He further testified that just prior to the time when Palapala was struck, he was trying to get the canvas from under the first sling load of sugar that was in the boat and he was looking at that. Palapala and himself were engaged at the same work at that time and the sugar

struck the former right on the chest (transcript, p. 93). Continuing:

"Q. Did this sugar stay on him" (the libellant) "for "any length of time?

"A. When this sling load of sugar struck him he "was knocked down and the sling load was hoisted up "again.

"Q. Who ordered it hoisted up, if anybody?

"A. Nobody ordered the sling load of sugar hoisted "up again.

"The COURT. By the winchman, of course.

"A. Yes.

"The COURT. You say nobody ordered him to do it?

"A. No one. * *

"Q. If the boat was steady, why was not the signal "given to let the sugar come down?

"A. We could not give any orders, because the can- "vas was under the first sling load of sugar. We had to "get that out before we could receive another one.

"Q. Was that the only reason the order was not given "to let the sugar come down?

"A. Yes, the only reason" (transcript, pp. 94-5).

Another one of libellant's witnesses, Kia, testified on his direct examination:

"A. I am the boatsteerer on the boat. The crew of "the boat had to take orders from me. We went up there "to receive sugar, to the wharf. We received the first "sling load of sugar alright, the second sling load of "sugar was lowered down by the winchman without "any notification from me or any of the crew, very fast.

" * * *

" A. Sam Palapala was hurt * * * right on the " breast here (indicating).

" Q. How many bags of sugar were in the sling load " that struck Palapala?

" A. Ten bags.

" Q. What was the weight of each of those bags?

" A. One hundred fifty pounds each" (transcript, pp. 96-7).

* * *

" Q. How did you keep the boat in position alongside " the wharf?

" A. There were two of the crew who attended to the " oars, they were oarsmen—that is, it was their duty to " hold the boat away from the wharf.

" Q. Do you remember what Sam Palapala was doing " just before the winchman dropped the sugar?

" A. He was trying to get that canvas out so as to " cover one side of the boat so the sugar would not " get wet" (transcript, p. 98).

On cross examination the witness said:

" The Court. Was this man injured by a reasonably " big wave coming in?

" A. He was not.

" The Court. How was he injured?

" A. He got injured on account of the winchman low- " ering that sling load of sugar without any notification " from the people in the boat.

" Q. What was the condition of the weather on that " day, as to wind and sea?

" A. It was calm so we could work.

" Q. You mean it was calm all day?

" A. It was quite calm in the afternoon. We had to " watch for our chances.

" Q. What do you mean by having to watch for your " chances?

" A. Well, we had to see when the sea was calm, that " is the time for us to go in.

" Q. During the afternoon it would be rough at times " and calm at times, and you would take advantage of " the calm moments to rush in?

" A. Yes.

" Q. There were times during that afternoon that it " was so rough that you could not work?

" A. No, we could work that afternoon.

" Q. What do you mean by saying that during that " afternoon you had to watch for your chances?

" A. We watched for our chances because sometimes " there were other boats at the landing and we watched " for them. When they came out we came in.

" The COURT. You watched for your chances with ref- " erence to the waves or something else, let us find out?

" A. Yes, we wait for our chances. We wait until one " boat is loaded, and when that boat came out, our boat " came in. Not in reference to the waves.

" The COURT. So that no time that afternoon the " storm or the waves interfered with the loading of sugar?

" A. No.

" The COURT. Neither the wind nor the waves?

" A. No.

" Q. Was there no wind at all that afternoon?

" A. There was some wind.

" Q. From which direction was it blowing?

" A. From the land.

" Q. How had the waves been in the morning, rough " or calm, big waves or small waves?

" A. In the morning, high seas, high waves.

" Q. Would you say it was very rough?

" A. It was very rough.

" Q. About what time did it calm down?

" A. I think it was after twelve o'clock.

" Q. Some time after your lunch?

" A. Yes.

" Q. How many bags were you taking off at a time in " the boat that afternoon?

" A. Two or four sling loads at a time.

" Q. Sometimes you took off two sling loads at a trip " and sometimes four, that afternoon?

" A. Yes.

" Q. Is it not a fact that when the weather is rough you " can only take off two sling loads at a trip?

" A. When it is rough, two or three sling loads.

" Q. And when it is calm?

" A. Four to five sling loads when it is calm.

" Q. Where in the boat was Palapala just before this " sugar struck him?

" A. He was on the side next to the landing, in the boat " on the right side, working on this canvas.

" Q. Stooping down trying to get this canvas from " under the sling?

" A. Yes.

" Q. It was while he was engaged in that work, as you " have described, that the sugar struck him?

" A. Yes.

" Q. When the sugar struck him what effect had it on " him?

" A. He was hurt.

" Q. Did he still continue standing?

" A. No, he fell into the boat" (transcript pp. 100-3).

* * *

" Q. (by the COURT) Are you sure that no notice was " given by the winchman before lowering the sling when " he did?

" A. There were no such instructions.

" Q. From anybody in the boat?

" A. From nobody in the boat.

" Q. How fast did it come down; did it come so fast " that the men in the boat could not regulate it or stop it?

" A. It did" (transcript p. 105).

" The COURT. Did it come down so fast that these men " could not stop or handle it?

" A. Yes.

Re-direct Examination.

" (By Mr. DUNNE).

" Q. As the sugar struck Palapala, what became of " it?

" A. It was hoisted up again.

" Q. Who hoisted it?

" A. By the winchman.

" Q. Did anybody in the boat give him an order to " hoist that sugar?

" A. No instructions from any one in the boat" (transcript p. 106).

The libellant, called on his own behalf, testified upon his direct examination:

" When we got to the wharf we received the first sling " load of sugar. The next thing I did was to try to get " the canvas with the first sling load of sugar, with the " assistance of Bob, so as to get enough canvas to prevent " the sugar from being wet. While I was fixing this, I " was stooping down when I stood up with this canvas, " that was the time I was struck with this sling load of " sugar, right in front here (indicating chest)" (transcript p. 113).

* * *

" Q. While that sugar was suspended over and above " that boat, did anybody in that boat directly or indirectly " approximately or remotely, do anything to or with that " sugar?

" A. No.

" Q. While that sugar was suspended there, was any- " thing said, and, if so, what, by any person in that boat, " to that winchman?

" A. No one.

" Q. When that sling load of sugar descended describe " its rapidity; I want the rapidity of its descent.

" A. That sling load of sugar was lowered half way " while I was tending to the canvas. This sling load of " sugar was lowered so fast that I didn't have time to get " out of the way.

"Q. Do you remember how many bags were in that "sling load?

"A. Ten bags" (transcript p. 114).

* * *

"Q. When this sling load of sugar descended, at what "rate of speed did it descend, if you know?

"A. It came down so fast nobody could handle it to "set it in place where it was wanted to be put in the boat" (transcript p. 123).

Upon cross-examination libellant testified:

"Q. Just prior to the accident what were you doing?

"A. I was fixing the canvas that was under the first "sling in the boat. I was trying to put it so as to pre- "vent the water from the sea getting to the sugar, to pre- "vent its being wet.

"Q. You wanted to put the tarpaulin or canvas so that "the waves would not wash in and wet it?

"A. Yes.

"Q. How many sling loads of sugar were in the boat "before the accident?

"A. Just one.

"Q. You are sure about that?

"A. One before the sling that came down and struck "me. * * *

"Q. Do I understand you that you did not see the sling "load that hurt you until it actually struck you?

"A. I seen the sling load lowered half way—lowered "by the winchman half-way.

"Q. After that you didn't see it again moving until "it actually struck you?

"A. Yes, sir.

"Q. You didn't see it come down to strike you?

"A. I didn't see it because I was fixing up the canvas "when I was stooping down. When I stood up the sling "load struck me on the breast.

"Q. Across the breast?

"A. Right about here (indicating the upper part of "the breast).

"Q. You say you were stooping down at that time?

"A. I was stooping down fixing the canvas to put it "to the side of the boat. When I stood up the sling load "struck me.

"Q. What about putting it to the side of the boat?

"A. The tarpaulin. I was trying to pull the tarpaulin "from under the first sling and put in more on the side "of the boat so as to cover the sling of sugar.

"Q. Had you taken the tarpaulin out from under the "first sling?

"A. I had just pulled it out.

"Q. You had just pulled it out?

"A. Yes.

"Q. You had not gotten it quite out at the time the "sugar struck you?

"A. Yes.

"Q. As a matter of fact, does not this tarpaulin lie in "the bottom of the boat always under one load of sugar?

"A. Half-way in the boat, and half of the tarpaulin at "the side of the boat" (transcript, pp. 126-8).

Captain D. F. Nicholson, who was called on appellant's behalf, testified that he was master of, and on the steamer "Helene" 350 feet away from the place of the accident (transcript, p. 160), although later he said the steamer was

lying about 100 feet away (transcript, p. 164). In reply to the question put by his counsel:

"It has been testified to, that this winchman suddenly "and without warning or signal let the sling load descend "to the boat with such rapidity that the men in the boat "could not stop; what have you to say in regard to that?" he answered: "I did not see that" (transcript, p. 163). He corroborated to some extent the testimony given by libellant's witnesses as to the condition of the weather, saying that in the afternoon it was much better than in the morning and that the men were only able to take 26 bags of sugar to the steamer in the morning, but during the entire day were able to take 1,000 bags (transcript, p. 164). He denied some of the testimony given by other witnesses called on appellant's behalf, by admitting that the winchman could, from his position, see the small boat perfectly at the time libellant was injured (transcript, p. 167); and although he limits the horizon of this man to the boat itself and its immediate surroundings (transcript, p. 169), it appears later, by the testimony of Richard Westoby, also called on appellant's behalf, that there was nothing to prevent the winchman, not only from seeing the place where the accident happened, but from looking out upon the open sea. Westoby's testimony upon this point is as follows:

"Q. Was there no signal given the winchman to hoist "the sugar?

"A. I did not see any.

"Q. Did you hear any?

"A. No.

"Q. You say the time the winchman hoisted the sugar " up, it was because he could see it?

" A. Yes.

" Q. Then the winchman saw this transaction, just as " well as you did?

" A. I suppose so.

" Q. Just before he hoisted this sugar, he had received " no signal, that you either heard or saw?

" A. I neither heard nor saw any signal.

" Q. When you speak of signal, I infer you mean the signal from the man in the boat?

" A. Yes.

" Q. There was nothing to prevent the winchman from " seeing the place where this happened?

" A. I presume not.

" Q. He could see quite clearly; there was no obstruc- " tion to prevent his seeing?

" A. No.

" Q. Could he see out upon the open sea?

" A. He could.

" Q. What had the winchman in the building to do, if " anything, to prevent his seeing the waves as they came " in?

" A. I suppose he had to keep his eye on the boat.

" Q. If he lifted his head, could he see the waves come " in?

" A. Yes, if he had done so. * * *

" Q. Have you ever examined the winch that the winch- " man was working at?

" A. Yes, sir, I have.

" Q. This winch is situated in a small winch-house?

" A. Yes.

" Q. Have you been in there?

" A. Yes.

" Q. Have you looked out of this winch-house?

" A. Yes.

" Q. You can see the place where the boats come in and " the sea out beyond?

" A. Yes.

" Q. You said you were looking through the window " and you saw the sling load of sugar hanging there, with " the boat underneath it. You also said you saw two men " there ready to receive the sugar; is that correct? * * *

" A. There were two men ready to receive it and trim " it. There are two men there with every boat to re- " ceive it. These men were standing ready to receive the " sugar, as usual.

" Q. When you describe that point you put up your " hands, indicating that the men were reaching for the " sugar?

" A. I did" (transcript, pp. 178-80).

Captain Nicholson placed the responsibility of the accident on no one (transcript, p. 170). The witness Westoby admitted that it was the duty of the winchman to keep his eye on the boat so as to be ready to receive the signal of the man in the boat to lower the sugar and that in lowering the sugar the winchman was guided by the signals from the man in the boat (transcript, p. 182).

S. Fujimoto, who was called on appellant's behalf, testified that he had as good a view of the occurrence as did

Naka, another one of appellant's witnesses, but that he could not see in what position libellant's arms were at the time of the accident, nor could he see whether or not his arms were extended (transcript, p. 194), thereby virtually contradicting Naka.

Manuel Enos, the winchman, also called on appellant's behalf, said, contradicting in part Captain Nicholson's testimony:

" Q. You say the sea was awful rough?

" A. Yes.

" Q. How did you know; did you see it?

" A. Yes.

" Q. Where did you see it?

" A. From the donkey.

" Q. From the donkey you could see when the weather " was awful rough, could you? (Interpreter here trans- " lates).

" A. Yes.

" Q. While you were in the well of the donkey, you " could see the landing and you could see the waves com- " ing in?

" A. Sometimes I could not see.

" Q. Why not?

" A. When the waves are close to the boat I cannot see.

" Q. You can see when the weather is awful rough, " you can see the waves coming in, can't you?

" A. Sometimes I can see, and sometimes I don't. My " time is practically taken up with looking at the men in " the boat.

" Q. Suppose you look, can you see these waves come " in?

" A. Suppose I look, yes.

" Q. There was nothing to prevent your seeing if you " want to; you can see if you want to?

" A. Yes" (transcript, pp. 200-01).

He explained that a big wave came under the boat, pushing it towards the landing just at the time libellant was injured.

" With the rising of the water the man got struck, and " when the man got struck I hoisted up the sugar at the " same time. * * *

" Q. Why didn't you hoist that sugar in the first place " instead of waiting until this man got his collar-bone " fractured?

" A. I didn't see this wave coming up.

" Q. Why didn't you see this wave coming up?

" A. I could not see it; I was watching the men in the " boat.

" Q. Didn't you go to work that day with the knowl- " edge in your head that the weather was awful rough?

" A. I could see it was rough" (transcript, p. 202).

This witness is the only one who states that any signal was given to him to hoist the sugar up, his self-interest apparently inducing him to testify as follows:

" Q. Did anybody give you a signal to hoist that sugar " up?

" A. Yes.

"Q. Point out the man in these four (comprising the " boat's crew with the libelant) who signaled to you to " hoist the sugar after this man got struck; identify him.

" A. That fat man (indicating witness named Bob " Toka).

" Q. You mean this man (indicating Bob Toka)?

" A. Yes.

" Q. When he signaled you to pull that sugar up again, " how did he do it?

" A. By that motion (indicating upward motion of " both hands).

" Q. By throwing up his hands?

" A. Yes.

" Q. When he did that was there anything to pre- " vent the other men in the boat from seeing Bob throw " up his hands in that way?

" A. I saw him make that signal. I do not know " whether the other men saw it or not.

" Q. I am asking you whether there was any physical " obstruction in or about that situation there, that pre- " vented the other men in the boat seeing Bob make such " a signal, if he made it?

" A. I do not know.

" Q. Do you mean you do not know of anything that " would have prevented the other men in the boat seeing " the signal, if it was made, the signal you swore to?

" A. There was nothing in the way to prevent them " seeing the signal" (transcript, pp. 203-4).

Bob Toka, when called in rebuttal by libellant's counsel, denied that he gave a signal to the winchman and he was corroborated by Hina, Kewiki and Kia, who were also recalled upon this point. The truth is that the winchman, seeing the danger to which he had subjected libellant, moved the lever of his machine and raised the suspended bales of sugar from the prostrate form of Palapala of his own volition, despite his assertion that he received

a signal so to do from Toka. The winchman was in a position at all times to see the boat, as he received his signals from one of the crew, and he admitted that it was within his vision.

Appellant suggests, as an indication of the height of the waves, that the sugar on the wharf became wet; but it must be borne in mind that the weather had been rougher in the forenoon than it was in the afternoon when the accident took place, even according to the admission of Captain Nicholson, one of the appellant's witnesses, to say nothing of the testimony of libellant's witnesses upon this point. The sugar on the landing might have become wet in the forenoon or water might have reached it in the afternoon indirectly from waves, such as spray or from rivulets or small streams of water frequently caused by a high sea. It is of far more importance in this connection to note that the sugar which had been suspended over the water and which caused the injury, was shortly thereafter taken into the small boat and carried to the steamer in apparently a dry condition, for the testimony shows that wet sugar was not taken on board the steamer but was run through the mill so as to take therefrom its dampness. How could this sugar have been kept dry if the water was as rough as contended for by appellant?

Then again, considerable sugar was shipped that day from the shore to the steamer, about 1,000 bags in all, practically the entire quantity being shipped in the afternoon; and despite the fact that as much as five or six thousand bags of sugar are shipped in a single day under good conditions, it would have been extraordinary if

those thousand bags had been transhipped from shore to the steamer in a dry condition in exceedingly rough weather.

Appellant endeavored to prove that the motion of these waves, which it claimed were about 22½ feet in height when the accident occurred, lifted the boat upward, causing libellant to strike the suspended half ton of sugar. Several admitted facts of the case, however, demonstrate the improbability, if not impossibility, of this theory.

In the first place, if the boat were under the sugar and the former had been suddenly lifted by a tremendous wave, it would at the same time have been moved towards the shore; hence, as libellant was in the shore end of the boat, he would have been carried past the sugar, and one of the men in the other end of the boat would have received the force of the blow.

Then, the boat was maneuvering 12 or 13 feet from the rocks on shore and in this position was taking its loads of sugar. Can it be successfully contended that this boat could have been safely handled so close to shore, with the waves running 22 feet high and a strong wind blowing on shore, and at the same time have been able to receive a cargo of sugar? As the trial court remarked, it would have been dashed to pieces on the rocks.

The court will further note that, had such a heavy sea been running, with the waves dashing against the landing, it would have been impossible for the men in the boat to have heard Capt. Nicholson's whistle from the steamer "Helene", 350 feet away seawards (transcript,

pp. 159, 160), especially as the winchman could not hear a call 150 feet away (transcript, pp. 171-172).

Finally, why was the sugar raised by the winchman after libellant was injured, if it had not theretofore been lowered into the boat? If a big wave, merely, had caused the damage, the danger was then over when the wave passed. The evidence, however, is to the effect that this sugar was on top of libellant just before it was raised, which indicates it must have been first lowered into the boat; and it is not claimed on appellant's part that any signal had been given to lower the sugar. The winchman acted on his own responsibility.

Therefore, the testimony offered by appellant respecting the size of the waves on the afternoon of the day of the accident is inherently improbable, and the courts have repeatedly held that the inherent improbability of a witness' statement may deny to it all claim of belief.

Blankman v. Vallejo, 15 Cal. 638;
Sonoma v. Stofen, 125 *id.* 32;
Tracey v. Phelps, 22 Fed. 634;
Quock Ting v. U. S., 140 U. S. 417.

As hereinbefore indicated, the position taken by the libellant and his witnesses is an affirmative one that the winchman did negligently drop the sugar into the boat; whereas Captain Nicholson, on appellant's behalf, did not undertake to say that the sugar did not drop, but that he did not see it drop; and Nicholson argues that the winchman did not drop the sugar because the former did not hear the steam escaping from the winch. He takes this negative position, notwithstanding his own testimony that

the deafening crash of the surf upon the rocks would prevent the winchman, who was at a distance of 150 feet, from hearing any calls from the boat, but he used the qualifying expression in the course of his testimony "as near as I could see"; and as between the affirmative testimony of the men in the boat on the one side and the negative testimony of Nicholson on the other, it is submitted there can be no choice. Upon this character of testimony the Supreme Court of the United States remarked:

> "The plaintiff denies the receipt of any such papers, and both the defendants swear positively to their delivery to the plaintiff.
>
> "On this subject the court charged the jury 'that it is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed.'
>
> "We are of opinion that the charge was a sound exposition of a recognized rule of evidence of frequent application, and that the reason of the rule, as stated in the charge, dispenses with the need of further comment on it here."
>
> *Stitt vs. Huidekopers,* 17 Wall. 384, 394.

Despite the attempted showing on the part of appellant that the winchman could not see the immediate surroundings of the boat, he admits himself that he could see if he looked, and this was also proven by the witness Westoby. It was therefore within the power of the winchman to so control the suspended bales of sugar as to have prevented them from causing injury to any one in the

boat. It was clearly within his view, because immediately after the accident he pulled the sling up, seeing libellant fall into the boat (transcript, pp. 197-8); and the winchman admitted that if he looked he could see the waves coming in (transcript, p. 201). Said the Supreme Court of California, in the case of

Glascock v. C. P. R. R., 73 Cal. 137, 141,

> "If he looked, he saw; and having age and faculties to understand the dangers, is charged with a knowledge of them, and was bound to act upon that knowledge as a prudent and cautious man would under the circumstances."

It is a well known rule of law that the greater the hazard the greater is the care required.

Schumacher v. St. Louis etc. Ry. Co., 39 Fed. 174.

See further:

R. R. Co. v. Freeman, 174 U. S. 379;
Marland v. R. R., 123 Pa. St. 487;
R. R. v. Hobbs, 19 Am. & Eng. R. R. Cas. 337;
Burke v. Traction Co., 48 Atl. 470;
Bailey v. R. R., 110 Cal. 320, 328;
Ehrisman v. R. R., 150 Pa. St. 186;
Buzsby v. Traction Co., 126 Pa. St. 559;
Tucker v. R. R., 124 N. Y. 315.

In the case of *Mather v. Rillston*, 156 U. S. 391, Mr. Justice Field, who delivered the opinion of the court, said in part:

> "All occupations producing articles or works of necessity, utility, or convenience may undoubtedly

> be carried on, and competent persons, familiar with the business and having sufficient skill therein, may properly be employed upon them, but in such cases, where the occupation is attended with danger to life, body or limb, it is incumbent on the promoters thereof and the employers of others thereon to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution, and for any negligence in this respect, from which injury follows to the persons engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted. * * * If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred and this fact should not be lost sight of.''

It is, therefore, we submit, clearly established by a preponderance of the evidence that it was the winchman's fault in lowering the sugar without a signal, rather than the height of the waves, that caused the injury to libellant.

III.

The next several assignments of error are devoted to the question of the *extent of the injuries* sustained by appellee. Again we can do no better than to set forth portions of the record upon this subject, even at the risk of unnecessarily prolonging this brief.

Hina testified that, after the accident, when the small boat got alongside of the ''Helene'', the libellant was hoisting up on board the ship in a sling (transcript, p. 46).

It thus appears that he was helpless. On cross examination he was asked by appellant's counsel:

"Q. What cry was that Palapala gave, what did he "say?

"A. Just when he was struck the force of the sling "load made him give a kind of a grunt.

"Q. Did Palapala assist himself as well as Bob?

"A. When he fell in the boat he was lying there still; "he could not move.

"Q. How do you know he could not move?

"A. When Bob was helping him—massaging him, he "could not move at all.

"Q. How long was it after that you brought him up to "the steamer?

"A. The time when he was hurt and Bob assisting, "that time we were rowing. We rowed right out to the "steamer.

"Q. How did you get aboard the boat?

"A. Strung up ropes and hoisted him up. Getting "him into position with ropes, we hoisted him up. We "tied up the ropes so we could hitch him in and "hoisted him up easily until he came to the steamer.

"Q. Was he hoisted by the crane?

"A. By the steam" (transcript, p. 60).

Kewiki testified that when the sling load of sugar struck libellant, the witness heard a groan and libellant then fell into the boat and laid there as if he were dead. One of the men then began to massage him and the boat rowed out to the steamer, the libellant being hoisted on board of her by means of a sling (transcript, p. 64). On cross examination, in reply to the question, "In what position

" when the sugar was raised off of him?" he answered, " He was like a dead man. He laid on the right of the " boat, in the boat" (transcript, p. 73).

Bob Samoa said that when the sling load of sugar was lifted up by the winchman, libellant laid as if he were dead and witness then massaged him and the men in the boat fixed a sling and thereby hoisted libellant on the deck of the steamer (transcript, pp. 83-4). On cross examination, counsel asked, "Can you say what was the " effect of it on Palapala?" and the witness answered, " He fell down and laid there like a dead man * * * " in the boat" (transcript, p. 93).

Kia testified that after libellant was struck he fell down and Bob Samoa jumped down to help and put him in a better place. Libellant could not get up at all as he was helpless. Thereafter he was put in a sling and hoisted on board the "Helene" (transcript, pp. 97-8). On cross examination, he said that they were obliged to use an ordinary box that passengers were landed in, in order to get libellant from the steamer to the shore (transcript, p. 104).

Libellant himself testified that when he was struck with the sling load of sugar, he was jammed up against the boat and fell into it, becoming unconscious; that he did not know anything that occurred after he was struck by the sugar up to the time he reached the steamer (transcript, p. 115). He further testified that his collar bone was broken; that he was brought back to Honolulu and taken to the Queen's Hospital. "The collar bone had been pain- " ing me and I had pains in the shoulder. This does

" not pain me all the time; some days I am all right and " sometimes it pains me off and on." He was in the Queen's Hospital six weeks after he had been treated for a time in the Plantation Hospital (transcript, pp. 116-7). He further testified that he had suffered pain all over his body and that at night time the pain had been so intense that he could not sleep, which was not his condition at the time he testified, although then he continued to have pains in his shoulder. He then proceeds to testify as follows:

" Q. How long after you arrived at the Queen's Hos-
" pital did these pains continue?

" A. About three weeks after I arrived at the hos-
" pital my pain kind of eased off—pain in the collar bone.

" Q. Then after that time you experienced no other
" pain?

" A. I have had pain in my shoulder, not continual
" pain, but at times, off and on.

" Q. How long after the first pain was it when the
" second pain started in your shoulder?

" A. I think a week after the pain went away from
" the broken collar bone that pain appeared in my shoul-
" der.

" Q. So that, as I understand the situation, the first
" pain was the pain of the collar bone fracture, and the
" second pain, which came after the first pain eased off,
" was in the shoulder?

"A. Yes, the first pain in the broken collar bone, the
" second was here in the shoulder.

" Q. You say the second pain you experienced, that

" it was off and on. That was off and on. What do you " mean by that?

" A. Sometimes when walking in the streets and shift- " ing my hand—that is, back and forward, and times " when I jerked it was the time the pain started; some- " times it would pain all day and all night and the next " day, and then the pain will leave me.

" Q. So that at times the movements of the arm will " start this pain?

" A. When I walk in the streets I cannot swing my " hand; I have to hold it up in this position (indicating " a position of right angles to his body). If I swing it " in the streets it starts to pain me" (transcript, pp. 118-9).

He further testified that he was not doing any work as a sailor or otherwise or able to lift articles or work at his business. He first went to a hospital at the plantation and a week thereafter came to the Queen's Hospital in Honolulu (transcript, pp. 122-3, 134). On cross examination he testified:

" Q. Will you describe what effect it had upon you?

" The Court. Just ask him how it affected him, that " is what the question was.

" A. I fainted after I was struck.

" Q. So you didn't feel anything?

"A. No, I didn't feel anything after that.

" Q. How did you know about where you fell in the " boat?

" A. I didn't know where I fell in the boat.

" Q. As I understood your testimony this morning, the

" first thing you did know was when you were in the " captain's stateroom? * * *

" A. The first time I came to know anything was when " we were about alongside the steamer, and they were " preparing to put me in the sling. That was the first " time I knew what I was about.

" Mr. STANLEY (to the interpreter). Tell him that I " don't want to be unfair. Tell him to answer the ques- " tions deliberately, and take all the time he wants.

" Q. How were you taken aboard the steamer?

" A. I was put in a sling, the usual sling for sugar " purposes. They lowered it down and I sat in the mid- " dle and was hoisted aboard.

" Q. You were sitting in the sling?

" A. They put the line over me and it was hoisted " up.

" Q. How did you hold on to that sling?

" A. I held on with my left hand. They held me in " with the rope's end" (transcript, pp. 132-3).

He then shows that it was three weeks after he came to the Queen's Hospital before they took the bandage off his shoulder, the first bandage having been taken off and a new one put on; and that he had done no work since he met with the accident. He had been keeping his arm in practically the same position and had not done anything with it. He first felt the other pain he spoke of, that is, the pain in the shoulder, sometime after the doctor had taken the bandage off his arm (transcript, pp. 135-6).

" Q. I understand you feel it sometimes whenever you " attempt to move your arm?

" A. Yes. And sometimes when I move in the night " it pains me, especially at night time when I try to turn, " that starts the pain.

" Q. Whereabouts in your shoulder have you got pain?

" A. Right on top, right in here, in the bone here (indi- " cating).

" Q. In the top of the arm?

" A. Yes, right here.

" Q. Right down here over the arm?

" A. Above the shoulder and down.

" Q. How far above?

"A. Just right on the shoulder here (indicating), and " down below.

" Q. You mean right down over the place where the " broken bone is?

" A. The place where the broken bone is is a differ- " ent place from where it is now. The broken place is " farther away than where the pain is.

" Q. You feel that whenever you swing your arm or " turn over at night in your sleep?

" A. The only time I feel the pain very much is at " night time when I turn over. It does not hurt so much " when I swing my arm" (transcript, pp. 136-7).

Dr. Humphries, called on libellant's behalf, testified from the symptoms shown by the evidence, particularly from the intermittent pain which did not exist in the immediate vicinity of the fractured clavicle, that tuberculosis might have set in, in the articulation itself, as the result of the injuries, or the symptoms disclosed might indicate neuralgia of the joint (transcript, pp. 142-3). He

said that if the joint had become tubercular in character, libellant might lose his arm or shoulder joint or even his life. The effect surely would be to shorten his life, but then if neuralgia had set in, it might pass away, or it might not; possibly amputation would be necessary, followed later by a deformity or a contraction. The doctor was inclined to believe that the trouble was neuralgic but he would not say it was not tubercular in character.

" Q. Assuming that this case exhibits neuralgia of " the joint, in your opinion would that incapacitate this " man from earning a living?

" A. It is impossible to say; it might come to ampu- " tation.

" Q. In you opinion, would you say the injury was " serious?

" A. Since yesterday I would say it certainly was" (transcript, p. 144).

Upon his cross examination Dr. Humphries testified as to the number and dates of the examination of the libellant made by him, having made the second examination the day before he was called upon to testify, and he gives his reasons why he has reached the conclusion to which he testified (transcript, pp. 154-6). In further replying to appellant's counsel, he testified as follows:

" Q. Is there anything external, Doctor, to indicate " the presence of such complications?

" A. External, you say?

" Q. Yes.

" A. The callous on the collar bone.

" Q. What does that indicate?

" A. The hardness of the callous would show a superficial union only.

" Q. Would that the fact that he is suffering pain when he jerks his arm suddenly or when he rolls in bed at night, would that indicate that the fracture is not properly united?

" A. He has no pain in reference to the point itself.

" Q. He says he feels pain in the shoulder?

" A. Yes, his statements are quite possible. (To Mr. Dunne.) 'Might I ask you how long his shoulder has been out of bandages'?

" Mr. Dunne. Three weeks after he arrived at the hospital. He was injured the 19th and taken into the hospital the 22nd. Three weeks from the 22nd of March.

" A. (continued) I would like distinctly to say that it would be a week that there would be pain in the arm and then the pain would cease, but he would have to get back the use of his arm.

" Q. You have heard what he said; that he carried his arm in a sling, that whenever he moved his arm suddenly and whenever he rolled at night it pains him. Would that effect be explained by not attempting to use his arm? Would that explain his pain in the shoulder caused by sudden movements?

" A. I should think that within three weeks the clavicle pain would be *pau* (extinct).

" Q. Even if the man had not used his arm in any shape or form, would he not experience pain if he attempted to use it in any way after its being bandaged up for three weeks?

" A. If he didn't use that arm for any purpose what-
" ever, not even for putting on his coat, I would agree
" with you.

" Q. If he did nothing at all?

" A. If he didn't use his arm at all. But I under-
" stand in the first place that he did attempt to use it.

" Q. Would not he experience pain in the shoulder
" if the man carried his arm bandaged for three weeks?

" A. If he carried his arm that length of time, and if
" he did not attempt to feed himself, I would agree with
" you.

" Q. You have heard the testimony.

"A. I say I heard him testify that when out in the
" street whenever he swung his arm he felt this pain"
(transcript, pp. 148-9).

His cross examination closed with the following testimony:

" Q. You are not prepared to say that tuberculosis
" exists?

" A. No.

" Q. You are not prepared to say it is neuralgia?

" A. No, but in my opinion it is one or the other.
" * * *

" The Court. If your fears should prove to be true,
" what then?

" A. If he has tuberculosis, he may never go to work
" again. If tuberculosis exists at the joint it destroys
" the articulation and may destroy the life.

" The Court. Any time?

" A. Yes.

" Q. Would he be able to do light work?

" A. Yes.

" Q. On board ship?

" A. Yes.

" The COURT. Is there such work as light work on " board ship?

" A. I never heard of any" (transcript, p. 151).

On his redirect examination, he stated, in reply to a question by counsel for libellant, that if the latter had neuralgia, it is impossible to say how long he might probably live. It might cause contraction, resection or even amputation and cancer might be started by neuralgia of the joint.

Captain Nicholson says, on his direct testimony, that after libellant had been hoisted up on the steamer from the small boat:

" I took him to my room and felt his collar-blade, and " found it broken in two places. I made the steward " hold it there until I bandaged it, but I saw that was " no good, it sprung out again, so I sent the boat in for " the box; the box that we use to take passengers ashore " in. When the box came in I put him in the box, and " sent him ashore to Mr. Gibbs, the manager.

" The COURT. That is, you did everything you could " do yourself, while you had him under your control?

" A. Yes, sir; I did what I could, but I have not much " knowledge in that line, so I sent him to get medical " aid.

" Q. Why did you do that?

" A. For the simple reason that I did not know enough " to set that collar bone properly. Whenever he moved,

" it would pull down and cause him pain, so I said he had " better go ashore to the first doctor" (transcript, p. 166).

Dr. Wood, who was called on appellant's behalf, testified that upon examining libellant:

" I found a newly united fracture of the right clavicle " about the middle. I will state that I knew that the " object of the examination I was making was to find out " what his injury was, for court purposes. I examined, of " course, first the fracture itself; I found, as I stated, a " newly united fracture. Then I conducted an examination " with the object of finding if the union which had formed " was strong enough to resist some force, and to what " extent, if any, the usefulness of the limb was impaired " at that time, whether he had some voluntary use of " his arm, and if so, how much, the amount of pain he " might have suffered from the injury to his arm and " shoulders. And also the object of finding whether I " could discover any complications outside the fracture.

" Q. As a result of your examination, what do you " say as to the usefulness of his arm, that was fractured?

" A. The right arm, to be definite.

" Q. The right arm?

" A. He can use it some at present, but not to a great " extent. He used it to remove his shirt; I did not ask " him to use it for that purpose, but in my examination " of him I tested the use of his arm for my own infor- " mation. * * *

" Q. In your opinion will the complete usefulness of " the libellant's arm be interfered with in any way by " the fracture?

" A. I think not permanently. It will take time to " get complete usefulness of the limb, of course, but I " think in time he will have perfect use of his arm. * * *

"A. I am talking of the collar bone. That is one of " the bones from which we expect good results. * * *

" Q. Was there any evidence of a permanent injury?

" A. A fracture of the clavicle is a permanent in- " jury.

" Q. Permanent injury to the usefulness of the limb, " the arm, the right arm?

" A. Nothing that leads me to believe or say that " the usefulness of that arm would be sorely impaired.

" Q. Is it not a fact that in the case of a simple " fracture of the clavicle, the complete and unrestricted " usefulness of the arm is not interfered with?

" A. It is so stated in the text books, and that is my " experience in uncomplicated fractures" (transcript, pp. 206-08, 210).

On cross examination he said that he did not make any special examination of libellant for the purpose of discovering the presence or absence of incipient neuralgia or tuberculosis of the joint (transcript, p. 211), and proceeds:

" A. I should say if a great weight fell on one's chest— " people have a habit of dating back to injuries of that " kind all future results that may develop. Of course " there may be internal injuries that will not be de- " tected, or there may be injuries not detected in the " examination.

" Q. With reference to this examination, would it be

" possible to discover neuralgia or tuberculosis of the joint " at a single examination, where there was no paroxysm " of pain, what do you say?

" A. There was no neuralgia. As far as tuberculosis " is concerned in this case—I was not looking for special " complications, I was looking for the ordinary compli- " cations. There might be a great many things that he " might have had, that I did not look for in the examina- " tion. I would not undertake to say until I examined " him for that point, that is, if he had neuralgia or tuber- " culosis, or anything in that category.

" Q. If it were true that, say, a man sustained a frac- " ture of the clavicle fifty days ago—let us say it was " true—that the bandages were removed three weeks " later, we will say that it is also true, that the pain in- " cident to the original reception of the injury had ceased " at the same time, or thereabouts, and a fresh or new " and independent pain had made its appearance at the " shoulder at the joint?

" A. You mean in the shoulder joint?

" Q. A cutaneous pain in or about the shoulder joint. " Would you say if these facts were established, that " it indicated a tubercular disease of the joint?

" A. I would examine him further for a tubercular " joint.

" Q. Suppose you should find that it not only com- " menced shortly after the original traumatism, but that " it was intermittent, would not that suggest to you, as " a professional man, the presence of either tuberculosis " or neuralgia?

" A. Those two symptoms belong to neuralgia, inter-

" mittent and cutaneous. Any pain might be intermit-
" tent, especially as you didn't qualify as to whether there
" is or there is not motion.

" Q. Is not neuralgia caused by injury to the nerves,
" sometimes?

" A. Any injury to the nerve might cause neuralgia.

" Q. Suppose a man lies down in his bed and tries
" to go to sleep, rolls over and that pressure causes the
" pain to appear in or about the fracture in the shoulder,
" what would you say to that?

* * *

" Q. All these conditions I have referred to, neuralgia
" and tuberculosis, they are rather serious, are they not?

" A. Tubercular joint is decidedly serious. It could
" not be more serious. As to neuralgia in any part of
" the body, it is harder to answer the question, because
" it is such an erratic disease. It might leave after treat-
" ment and it might not leave at all.

" Q. Tuberculosis does sometimes result in losing the
" arm and also in death?

" A. It often does.

" Q. Are there not cases of neuralgia of the joint
" where desperate measures are necessary?

" A. There are extreme cases of neuralgia, in which
" such desperate measures as amputation are necessary.
" The patient can get no peace or sleep, and something
" has to be done" (transcript, pp. 212-14).

Dr. Cofer, also called on appellant's behalf, said that he made a cursory examination of libellant, finding the man in a good condition as far as he could judge from

an examination of that nature; that he saw him again at the time when Dr. Wood informed him that the latter had been retained as an expert in connection with this case. Witness did not examine libellant but he saw Dr. Wood examine him and "that is about all the connection " I had with him" (transcript, p. 216). Dr. Cofer thought that libellant's arm could be used in the course of a month, in which event he should have permanent recovery, provided he had a chance to get light exercise and was willing to take advantage of it (transcript, pp. 217-8), and he saw no signs of complication in the injury, admitting "any fracture will be a permanent injury because " the bone will always be broken. In that sense it is " permanent, but I think that after 30 days, provided he " does light work, in order to get the muscles in train- " ing, that it will not be a permanent injury in that sense" (transcript, pp. 218-9). He further said that if nothing went wrong, a man sustaining a fracture of the clavicle was usually discharged from the hospital at the expiration of six weeks from the time of the accident (transcript, p. 219). On his redirect examination, in reply to the question propounded by his counsel,

" Q. It would be something exceptionally rare to have " tuberculosis develop from a simple fracture of the clavi- " cle?"

he said,

" That could be better answered by Dr. Wilson or Dr. " Sinclair, who had charge of this particular case and " know what it shows. I would rather not answer that " question until after looking up the authorities. I can-

" not keep in my head the statistics necessary to answer " that question" (transcript, p. 223).

Dr. Wood was thereupon recalled, on appellant's behalf, testifying in part as follows:

" Q. Will you state the result of the examination?

" A. I would say that I was called to examine the " libellant and determine whether I found any symptoms " of incipient tuberculosis or neuralgia of the joint. That " is to say, I made another special examination along " those lines. As far as my own opinion is concerned, I " should bar out neuralgia of the joint. Rather to the " surprise of both of us, he has a temperature of 100½ " and a pulse which is over 100, which means he has some " acute inflammatory trouble if he did not have the pulse " and temperature previously. His coat is coated and red- " dened along the borders, indicating digestive troubles, " such as dengue fever. What should be inferred from " that pulse and that temperature, I am not willing to " say on so short an examination. I re-examined the " joint and I am satisfied he has not neuralgia. I saw " no signs of tuberculosis with the single exception of " the increased pulse and temperature and the appar- " ent increased pain in moving the joint.

" The Court. What is normal?

" A. Ninety-eight and two-fifths to ninety-eight and " three-fifths.

" The Court. What would be the normal pulse?

" A. The normal pulse?

" The Court. For a man of his years?

" A. The individuality also enters into it. Sometimes

" it gets down to 60 or 70 and sometimes as high as " 80. I believe the life insurance companies will not " allow their examiners to pass a man whose pulse is over " 84 to 86. They will have you examine him another " day. I presume that an average would be 76 to 80.

" The COURT. What was this man's pulse?

" A. Fifty odd beats in half a minute.

" The COURT. That is unusual?

" A. It means fever.

" The COURT. Can a man have that pulse and that " temperature and be well?

" A. Oh, no.

" Q. It might be dengue?

" A. Anything that produces fever would give that " temperature and that pulse" (transcript, pp. 224-5).

Finally Dr. Humphries was recalled on libellant's behalf, and testified:

" Q. (By Mr. Dunne). I wish to ask you, Doctor. " concerning this examination of the libellant which you " made a few moments ago in connection with Dr. Wood. " Will you kindly state the result of that examination?

" A. Dr. Wood conducted the examination and I " watched him. There was pain on deep pressure. Doc- " tor placed his finger in the arm-pit, and we were both " satisfied that there was pain.

" Q. What else was observed?

" A. He had increased pulse and temperature.

" Q. What was his temperature?

" A. One hundred and one-half, two degrees of fever.

" Q. The pulse?

" A. Over 100.

" Q. Would you call that temperature and that pulse " normal?

" A. Oh, no.

" Q. In what respect was it abnormal?

" A. It was two degrees of temperature above nor- " mal. The pulse is twenty beats, certainly too fast to " the minute.

" Q. From what you have observed in the case and " what you saw just now, and knowing the history of the " case, what would you say as to whether the symptoms " are consistent with incipient tuberculosis?

" A. They are.

" Q. I will ask you whether a man exhibiting these " conditions and symptoms would be recommended to go " to work by any Christian physician?

" A. I do not think so.

" The Court. How much fever did you say he had?

" A. Two degrees. The range of fever is only 8 de- " grees.

"Q. Is this man an insurable risk?

" A. He is not insurable in any company. His pulse " and temperature would veto it.

" The Court. Did the man appear to be sober?

" A. Yes" (transcript, pp. 229-230).

The foregoing excerpts show, we respectfully submit, that the injuries sustained by Palapala were far more serious that a mere simple fracture of the clavicle and fully sustain the finding of the learned court below that his present and immediate future earning capacity was

totally impaired. In this connection, it may be well to call to the court's attention, in view of the affidavits which have been submitted recently on appellant's behalf on its motion for leave to take new testimony, that C. L. Wight, one of its witnesses, president of the Wilder Steamship Company, stated on the witness stand that his company was willing to give the libellant the kind of work he was able to do in his then present condition (transcript, p. 227), and yet in the moving affidavit of Joseph James Fern, who is employed by the Wilder Steamship Company to hire and discharge its seamen and stevedores, it appears that Palapala has on several occasions since July 27th, 1903, requested Fern to give him regular employment as a sailor, which was refused, libellant thereby showing, as is further stated in his own affidavit, that he was trying to do everything he could to keep from being a charge upon his family or friends, although the Steamship Company for which he had formerly worked, knowing undoubtedly his present incapacity to perform any serious manual labor, was unwilling, despite the statement in court of its president, to afford him the opportunity for such service as he could render.

There was little chance for the practice of any deception on libellant's part regarding the character of his injuries. Not only does his testimony appear straightforward and free from suspicious circumstances, but he was also subjected during the trial to an examination at which appellant was represented by some of its medical witnesses; and after that examination Dr. C. B. Wood was recalled as a witness for appellant and admitted that

he was surprised to find that libellant had "a tempera-
" ture of 100½ and a pulse which is over 100, which means
" he has some acute inflammatory trouble, if he did not
" have the pulse and temperature previously". He was unwilling, however, to state what inference should be drawn from those symptoms, although he felt satisfied that he did not have neuralgia of the joint. He admitted that the injury might end in tuberculosis (transcript, p. 226).

Here, then, is a man of no means, young, just entering upon a career of active work, and up to the time of the accident strong, healthy and able to follow a calling requiring vigor and strength. His health formerly was his only capital, and it appears that he has been now deprived of that, not merely temporarily or for the immediate future, but to a greater or less extent, which is yet problematical, permanently. He has shown beyond any contradiction, as elements of the damage which he has sustained, the physical pain which was attendant upon the injury and the mental suffering which not only inevitably accompanies the physical pain, but also caused by worry at his inability to support his father. He contributed to his father's support, as is shown by his own and Toka's testimony. The evidence shows that Fern knew what arrangements libellant had made for the support of his father, and yet appellant failed to put this man upon the stand, if a contradiction of this testimony were possible. Finally, libellant has suffered a severe temporary, perhaps permanent, loss of earning capacity. He is unable to work at his customary calling, despite his

praiseworthy efforts to relieve himself as far as possible from being a burden upon his friends.

Relative to the measure of damages, the following authorities to which we respectfully invite the Court's attention, are important:

Grant v. U. P. R. R. Co., 45 Fed. 673;
Sproule v. Seattle, 17 Wash. 256, 262;
West Memphis Packet Co. v. White, 41 S. W. 583-7;
Schultz v. Chicago etc. R. R., 48 Wis. 375, 383;
Newport News etc. R. R. v. Campbell, 25 S. W. (Ky.) 267;
The Mineola, 44 Fed. 143;
The Slingsby, 116 Fed. 227;
Dist. of Col. v. Woodbury, 136 U. S. 450, 459;
W. & G. R. R. Co. v. Harmon, 147 U. S. 571, 573-4.

We may say in conclusion that the trial court was in a better position than is the appellate court to determine the facts of this cause. In the court below the witnesses were all examined orally in court; there was no deposition taken and that court had the opportunity of judging the demeanor of each witness when upon the stand, his apparent candor or lack of candor and manner, whether hesitating or otherwise, in which he gave his testimony. This court is deprived of those advantages and as the testimony which appears of record amply warrants the conclusion drawn by the lower court, we respectfully submit that this court should affirm the decree.

PAGE, MCCUTCHEN & KNIGHT,
J. J. DUNNE,
Proctors for Appellee.

No. 981.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

In Admiralty.

PAAUHAU SUGAR PLANTATION COMPANY, (A CORPORATION),
Appellant,

vs.

SAMUEL PALAPALA,
Appellee.

Upon Appeal from the United States District Court for the District of Hawaii.

APPELLANT'S PETITION FOR REHEARING.

MORRISON & COPE,
HOLMES & STANLEY,
R. D. SILLIMAN,
Proctors for Appellant.

THE MURDOCK PRESS, S. F.

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APPELLANT'S PETITION FOR REHEARING.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant, the Paauhau Sugar Plantation Com-

pany, a corporation, respectfully petitions the court for a rehearing of the above-entitled appeal, on the following grounds:—

1. That the court does not seem to have had before it or to have considered the "Argument and brief for "appellant filed pursuant to stipulation between coun- "sel," on file herein, for it does not refer at all to many of the points made therein; and, moreover, there is no mention made of the name of R. D. Silliman, as one of the counsel for the appellant, although his name appears on said brief as such counsel.

2. That it does not appear that the court considered or passed upon the second point stated and argued in said brief, namely: that the accident was in fact caused by the negligence of the appellee and his fellow-servants.

3. That it does not appear that the court considered or passed upon the following point embodied in the third subdivision of the said brief, namely: that the record from the court below upon the question of the extent of the injuries sustained by the appellee was in such condition that this court, as a new court of trial in admiralty, ought to make an order for taking depositions in order that further light as to the exact nature and extent of the injuries sustained by the appellee might be had.

4. That the court does not seem to have considered the affidavits filed herein, subsequent to the rendering of the decree in the court below, showing the physical condition of the appellee at a time later than the trial,

and which are quoted at length in the third subdivision of said argument and brief.

All of the matters above referred to were fully gone into in said argument and brief upon which said cause was submitted, and a showing was there made which, as we believe, demonstrated:—

First: that the appellee himself was guilty of contributory negligence;

Second: that his injuries were not of that serious character that he represented at the trial; and that in the event that the court charged the appellant with negligence and exonerated the appellee from contributory negligence, the ends of justice clearly required that the appellant be permitted to show that the injuries of the appellee were of no serious character.

WHEREFORE, it is respectfully submitted that the ends of justice require that a rehearing should be granted.

MORRISON & COPE,
HOLMES & STANLEY,
R. D. SILLIMAN,
Proctors for Appellant.

A. F. Morrison and R. D. Silliman, two of the proctors for the appellant, hereby certify to the court that, in the judgment of each of them, the above petition is well founded, and that it is not interposed for delay.

Dated February 27, 1904.

A. F. MORRISON,
R. D. SILLIMAN.